CALCUTTA HIGH COURT

The Anglo Persian Oil Co

Vs

Commr.of Income Tax

(Rankin ,C.J.)

08.02.1933

JUDGMENT

Rankin, C.J.

1. The assessees are the Anglo-Persian Oil Company (India) Ltd., a company incorporated in England. They have since 1921. carried on, in India the business of selling fuel oil and other products through selling agents paid by commission on sales. Until-1928 the selling agents were Messrs. Shaw, Wallace & Co., but in that year the assessees determined this agency and a new company called the "Burma Shell Oil Storage and Distributing Company of India" became the selling agent of the assessees. Pursuant to certain verbal negotiations the assessees in August 1928, paid to Messrs. Shaw, Wallace & Co. the sum of Rs. 3,25,000 as compensation for the loss of their office as agents to the assessees. The payment made in 1928 came to be considered by the income-tax authorities when dealing with assessments for the year 1929-30. In that year of assessment, the present assessees-the Anglo-Persian Oil Company (India), Ltd.-put forward the payment as a permissible deduction from their gross profits and their claim was allowed. Messrs. Shaw, Wallace & Co., the recipients, were at first assessed upon that sum as part of their profits of the previous year, but the question was taken by them to this High Court, where it was decided [In re Shaw, Wallace & Co. that the sum received was not income, profits or gains within the meaning of the Income-tax Act. The income-tax authorities appealed from this decision to the Privy Council, but meanwhile proceeded under Section 34 of the Act to re-open the question with the present assessees, claiming that as the High Court had held that in the hands of the recipients it was a receipt on capital account, it must needs follow that in relation to the business of the assessees it was in the nature of capital expenditure, or a "capital payment." The income-tax officer, the Assistant Commissioner, and the Commissioner have all agreed in this and appear to regard it as a simple and obvious truth. The two questions referred to us by the Commissioner under Section 66 of the Act are as follows:

1. Whether the sum of Rs. 3,25,000, being money paid by the company in a lump sum as compensation for loss of agency, whereby the company relieved itself of future annual payments of commission chargeable to revenue account, can be disallowed as being an improper deduction from the income, profits or gains of the business and whether an equivalent part of the company's income was chargeable to tax therefor. 2. Whether Section 34 of the said Act could in law be applied, in the circumstances of the case, to re-open the assessment and review a deduction made and allowed and whether an equivalent part of the income could be subsequently held to be a part of the income, which had escaped assessment.

2. Now, after this reference had been made, the appeal in the case of Messrs. Shaw, Wallace & Co. [Commissioner of Income-tax, Bengal v. Shaw Wallace & Co. was decided by the Judicial Committee (14th March 1932). The appeal was dismissed, but the finding-that the money received by Messrs. Shaw, Wallace & Co., was not income, profits or gains within the meaning of the Indian Act-was in no way based upon the view that it was a receipt on capital account. Indeed, upon the facts as stated in the case then before their Lordships, they do not appear to me to have thought that view correct in the absence of any assignment of goodwill or other asset.

3. Now the present assessees, who after all were no parties to the proceedings to assess Messrs. Shaw, Wallace & Co., and had no opportunity therein at any time to put forward any facts about their own business and how they came to make this payment, took the proper steps to do so before the Commissioner, in so far as this was necessary to meet the adverse findings of the income tax officer and Assistant Commissioner. Their petition the Commissioner has on all material points accepted as a statement of truth and has very fairly incorporated in his own statement of the facts. In particular, he has, in formulating the first of the two questions submitted, embodied the statement that the Rs. 3,25,000 was money paid by the company in a lump sum as compensation for loss of agency, whereby the company relieved itself of future annual payments of commission chargeable to revenue account.

4. This is part of what was pleaded by the assessees as bringing them within the decision of the English Court of appeal in Anglo Persian Oil Company, limited v. Dale (1932) 1 KB 124 and as showing that the payment was not in the nature of capital expenditure. Save for their reference to the Shaw Wallace case , neither the Assistant Commissioner nor the Commissioner has dealt on the merits with the contention of the present assessees. Yet the parties are different, the question of law is different and the statement of facts in the two cases is noticeably different. The Advocate-General, at the hearing of this reference, did not seek to support the reasoning of the income-tax authorities to the effect that the receipt by Messrs. Shaw, Wallace and Co. was a capital receipt and that therefore the payment by the present assessees was a capital payment. On the contrary he conceded at an early stage of Mr. Pugh's argument that the payment in question

was not capital expenditure. We are therefore relieved of the duty to examine the principles of law, by which expenditure is distinguished as on capital account or revenue account. I think it right to say however that the Commissioner and his assistant adopted a wrong method of approach to the present question. The principle, that capital receipt spells capital expenditure or vice versa, is simple, but it is not necessarily sound. Whether a sum is received on capital or revenue account depends or may depend upon the character of the business of the recipient. Whether a payment is or is not in the nature of capital expenditure depends or may depend upon the character of the business of the payer and upon other factors related thereto.

5. If a tramway company buys six tramway cars from a concern, whose business it is to make and sell such articles, I doubt whether the income-tax authorities would allow the tramway company to lessen its taxable profits for the year by deducting the price, and I doubt still more whether they would listen to an argument from the seller that the price was received on capital account. If a butcher sells his pony to a horsed ealer, or a tradesman sells his delivery van to a dealer in motor vehicles, it is not obvious to me that the price is a revenue receipt, though I am certain it is not a, capital payment. The case of payer and payee must be considered upon an independent statement of the relevant facts proved in his presence, there being no overriding principle of law that the income-tax authorities are entitled to tax once at least on every payment. As the first question submitted to this Court is limited by its terms to the particular payment of Rs. 3,25,000 made by the assessees in August 1928, it might well be thought that the reference was concluded by the Advocate General's admission. He asked us however to consider two further points, suggesting (a) that the payment was not shown to have been made solely for the purpose of earning profits and (b) that, even if this were shown, it was not made solely for the purpose of earning profits in the year of account. For this purpose he expressed himself as willing to accept the statement of facts contained in the assessees' own petition filed before the Commissioner. In my judgment, no effect can be given to either argument.

6. As regards (a), no doubt, if it appeared from the assessees own case or the facts found that the payment was made by way of distribution of profits or, was wholly gratuitous or for some improper or oblique purpose outside the course of business management, we could not regard the deduction as permissible. But no such suggestion can be made even upon the facts found in the case stated and there appears to me to be no reason why we should entertain it. The income-tax authorities do not at any stage appear to have considered that there was any doubt about the matter. As regards (b), the argument must be held erroneous. Clause (ix), Sub-section (2), Section 10 of the Indian Act does not say and does not mean that the expenditure must be made with a view to produce profits in the year of account. This was held by the Bombay High Court in In re Tata Iron and Steel Co. Ltd. AIR 1921 Bom 391 and, though the case of *Vallambrosa*

Rubber Co., Ltd. v. Farmer[1] was not decided under our Indian Act, the judgment of the Lord President of the Court of Session in Scotland in that case may conveniently be referred to as very fully disclosing the soundness of the Bombay decision. The first of the two questions referred to us must, in my judgment, be answered in the negative, that is, in favour of the assessees.

7. The second question is really whether Section 34 of the Act could have been applied to the present case, had it appeared that the original allowance of the deduction was unwarranted. Strictly speaking, this question does not, in my opinion, arise but, as the point of law has been fully argued and as it might have been taken as a preliminary objection to the new assessment, I think it well to express an opinion on it. I see no way of holding that Section 34 is inapplicable to put right an assessment by which a deduction has been improperly allowed. Such a case is, in my opinion, a case of income escaping assessment-not the whole income of the assessee but a part of it escaping assessment-and there is nothing in Section 34, which limits it to cases of non-disclosure by the assessee, or discovery of new matter by the income-tax authorities or inadvertence as distinguished from erroneous deliberations on the part of these authorities. In most cases of under-assessment of profits it could be said that the whole profits were assessed at a certain figure; but where that figure is shown to be less than the true amount of assessable profit, the balance has, in my opinion, escaped assessment" within the meaning of those words as they appear in Section 34. We have been referred to the Madras decision in *Commissioner of Income-tax v. Raja of Parlakimedi*[2] from which I see no reason to differ, and to the English case of *Anderton and Halstead, Limited v. Birrell*[3] which does not seem to afford any assistance upon the construction of the Indian Act.

8. In view of the form of the second of the questions referred to us however we need make no formal answer to it. I think the assessees should be paid their costs of the reference by the Commissioner. These costs to be taxed by the Registrar, Original Side, independently of Rule 7, Ch. 30-A of the Original Side Rules and to include two counsel.

Buckland, J.

9. I agree.

Cases Referred.

1(1910) 5 Tax Cases 529
2AIR 1926 Mad 287
3(1932) 1 KB 271