CALCUTTA HIGH COURT

Commissioner of Income-tax

Vs.

Calcutta Landing and Shipping Co. Ltd

Income-tax Reference No. 16 of 1965

(S.P. Mitra and P. Chattjerjee, JJ.)

21.06.1968

JUDGMENT

S.P. Mitra, J.

1. In this Reference under Section 66(1) of the Indian Income-tax Act, 1922, the assessee is a limited company, whose main business is trans port of cargo from ships berthed at the Calcutta Port. The assessment year is 1961-62. The relevant previous year ended on the 31st October, 1960. Messrs. K. C. Bose and Co., a firm of Chartered Accountants, were the assessee's tax con sultants. The assessments for the years 1948-49 to 1952-53 were reopened under Section 34 (1) (a) of the Indian Income-tax Act, 1922. At that time the original assessments for the years 1953-54 to 1959-60 were also pending. The assessee agreed to pay Messrs. K. C. Bose and Co. consoli dated fees at the rate of Rs. 2,000 for each assessment year for these twelve years for settling each year's assessment irrespective of the fact whether there was any appeal or not in respect of a particular year.

2. Out of the sum of Rs. 24,000, a sum of Rs. 8,000 was paid in the preced ing year and was allowed by the Income-tax Officer as a deduction for the assess ment years 1961-62; the assessee paid the balance of Rs. 16,000 and claimed the amount as a deduction under Section 10 (2) (xv) of the Act.

3. In respect of the assessments for the years 1948-49 to 1953-54 Messrs. K. C. Bose and Co., conducted the cases on behalf of the assessee before the Income-tax Officer, while the appeals before the Appellate Assistant Commissioner and the Tribunal were conducted by an Advocate of this Court to whom separate fees were paid.

4. For the assessment years 1954-55 to 1956-57 Messrs. K. C. Bose and Co., ap peared before the Income-tax Officer and also conducted the appeals filed on be half of the assessee before the Appellate Assistant Commissioner but there were no further appeals to the Tribunal.

5. With regard to the assessment years 1957-58 to 1959-60 Messrs. K. C. Bose and Co. conducted the cases before the Income-tax Officer and also the appeals before the Appellate

Assistant Commis sioner and the Tribunal.
6. The Income-tax Officer held that as Messrs. K. C. Bose and Co. had not only appeared before the Income-Tax Officer " but also appealed to the Appellate Assistant Commissioner and the Tribunal an amount of Rs. 8,000 could be estimated as apportion able to fees payable for appearing in the appeal proceedings. He held that this amount of Rs. 8,000 was not allowable as a deduction and added the amount back.

7. The Appellate Assistant Commissioner agreed with the Income-Tax Of ficer and did not interfere with his de cision.

8. Before the Tribunal it was urged on behalf of the assessee that there was no justification for treating the fees paid for services rendered by the tax consul tants before the Income-Tax Officer and those before the appellate authorities on different footing. As per terms of the agreement, a consolidated fee of Rs. 2,000 for each year had to be paid irrespective of the fact whether there was any appeal or not and whether such appeals were to be conducted by the tax consultants or by separate Advocates. Relying on the deci sion of the Madhya Pradesh High Court in *Binodiram Balchand v. Commissioner of Income-tax, M. P*[1]*.,* the Tribunal held that the agreement for the payment of consolidated fees of Rs. 2,000 for each assessment year irrespective of whether there was any appeal or not was entered into by the assessee on grounds of commercial expediency. The Tribunal agreed with the assessee's contention that it was immaterial whether the fees were paid for attending the proceedings before the Income-tax Officer or before the Appel late Assistant Commissioner or before the Tribunal. Accordingly, the Tribunal held that the entire amount of Rs. 16,000 claimed by the assessee was an admissi ble deduction under Section 10 (2) (xv).

9. The following question of law arising out of the Tribunal's order has been referred to this Court :-

> "Whether, on the facts and in the cir cumstances of the case, the Tribunal was correct in holding that the sum of Rs. 16,000 paid by the assessee as pro fessional fees to its Tax Consultants for their services at the consolidated rate of Rs. 2,000 per assessment year for settling each year's assessment irrespective of the fact whether there were any appeals or not, was an admissible deduction under Section 10 (2) (xv) of the Indian Income-tax Act, 1922?"

10. In this Court the case has been argued by learned Counsel for both the parties from a broader point of view. Numerous authorities were cited before us. But for the purpose of the present reference we shall restrict ourselves only to a few which appear to be strictly relevant.

11. In *Smith's Potato Estates Ltd. v. Commissioners of Inland Revenue*[2]*,* at p. 277, the company was a subsidiary company of Smith's Potato Crisps (1929) Ltd. The parent company was assessable to excess profits tax in respect of the profits of its subsi diary. The Commissioners of Inland Re venue, acting under Section 32 of the Finance Act, 1940, disallowed in the com putation of profits of the subsidiary com pany for the period ending March 31, 1941, the excess over £ 3500 of the re muneration paid to one Mr.

[1](1963) 48 ITR 548 : (AIR 1963 Madh. Pra. 223)

[2](1929) 30 Tax Cases 267

Young, the General Manager of the subsidiary com pany. Both companies appealed to the Board of Referees and were successful in getting the sum of £ 3,500 increased to £ 5,800. The subsidiary company in curred legal and accountancy costs in the preparation and prosecution of that appeal and claimed to deduct them in computing its profits for Income-tax pur poses. The claim of the subsidiary com pany as well as claim by the parent com pany to deduct the said costs in comput ing the profits of the subsidiary company for purposes of Excess Profits Tax came on appeal ultimately to the House of Lords. There were differences of opinion between the Learned Law Lords which we shall presently discuss.

12. But before we do so, it would be useful to quote the English Rule 3 (a) and compare the provisions thereof with the relevant provisions of our Statute. The English Rule 3 (a) under Schedule D was as follows :

> "In computing the amount of the pro fits or gains to be charged, no sum shall be deducted in respect of (a) any dis bursements of expenses, not being money wholly and exclusively laid out or ex pended for the purposes of the trade, profession, employment, or vocation."

13. In our Income-tax Act, 1922, Sec tion 10 (2) (xv) as t stood upto 1939 was as follows :- Section 10 (a). "Such profits or gains shall be computed after making the fol lowing allowances, namely :-

> (xv) any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of earning such profits or gains."

14. By Act 7 of 1939, these provisions were amended and the new provisions stood as follows : -

> "any expenditure (not being in the nature of capital expenditure or personal expenses of the assessee) laid out or ex pended wholly and exclusively for the purpose of such business, profession, or vocation."

15. It is to be observed that for the expression "for the purpose of earning such profits or gains" the legislature chose to use the expression "laid out or expended wholly and exclusively for the purpose of such business, profession or vocation." We shall notice later the signi ficance of these alterations.

16. Then there was a further amend ment by Act 25 of 1953 and the latest provision stood thus :-

> "any expenditure not being an allow ance of the nature described in any of the clauses (i) to (xiv) inclusive and not being in the nature of capital expenditure or personal expenses of the assessee, laid out or expended wholly and exclusively for the purpose of such business, profes sion or vocation."

17. Now coming back to the case of Smith's Potato Estates, Ltd., (1929) 30 TC 267, Lord Green, M. R., was the principal exponent of the majority view that the expenses incurred by the assessee

were not deductible expenses under Rule 3 (a) of Schedule D. At p. 282, Lord Green has said : -

> "..... costs incurred in ascertaining the correct amount of tax are incurred by a tax-payer partly if not mainly in his capacity as a tax-payer and for the purpose of securing that his liability as tax-payer is assessed at the correct amount and cannot be said to be wholly and exclusively laid out for the purposes of his trade."

18. Viscount Simon and Lord Oaksey did not agree with this view. Viscount Simon has stated at page 284 : -

> "It seems to me that it is essential for the proper carrying on of a trade that the trader should know what portion of his profits in a given year is left to him after the Revenue has taken its share by taxation. If, therefore, he considers that the Revenue seeks to take too large a share and to leave him with too little, the expenditure which the trader incurs in endeavoring to correct this mistake is a disbursement laid out for the pur poses of his trade. If he succeeds he will have more money with which to earn profits next year. It is true that the result of his success is to reduce the tax he has to pay - alternatively, one may say that the result is to show that the profit of the year's trading left to him after paying tax is greater than the Revenue was willing to admit but to my mind the purpose was a trading purpose and nothing else. The trade is not to be regarded as extending over twelve months and no more; indeed, as I have already pointed out, Excess Profits Tax is liable to be adjusted in the light of subsequent trading results and assess ment for Income Tax is arrived at on figures of the previous year.
>
> With all respect to those who think otherwise, I regard it as fallacious to argue that the trader's expenditure in fighting the Revenue's assessment is not "wholly and exclusively" incurred for the purposes of the trade, because the expenditure would not be incurred if there was no tax to pay. If there was no tax to pay the benefit rea lised by the trader from carrying on the trade would not be reduced by taxation and it is the purpose of trade (at any rate under private enterprise) to make its legitimate profit.
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> Viewed in this light I do not see why the expenditure here in question is not wholly and exclusively laid out for the purposes of the trade; if it had not been incurred, the trade would be less profit able. Lord Lavey's gloss on the words of the statute in *Strong and Company of Romsey Ltd. v. Woodifield*[3], is well known, but I think it is better to concentrate on the statutory words themselves. Rightly understood, how ever, I do not find that Lords Lavey's words contradict the view that I am dis posed to take. *Strong and Co. v. Woodi* field was a case in which the tax-payer sought to deduct a loss not connected with or arising out of his trade. Lord Loreburn, L. C., said, at page 452: "I think only such losses can be deducted as are connected with, in the sense that they are really incidental to, the trade itself." Lord Lavey's test was that the purpose of the expenditure must be "the purpose of enabling a person to carry on and earn profits in the trade" (page 453). Here the expenditure was, in my view, incurred for the purpose of carrying on and

[3](1906) AC 488

> earning profits in the trade, for a reduction in the amount of tax does in crease the fund in the trader's hands after tax is paid and so promotes the car rying on of the trade and the

earning of trading profits. The incidental conse quence that the trader is not taxed so heavily in respect of his profits from trade does not, as it seems to me, alter the fact that the litigation was wholly and exclusively undertaken for the pur pose of the trade ....."

19. There are also a few weighty ob servations of Lord Oaksey. He has said at p. 297 : -

"..... But it is the character of the expense which must be considered. The expense in this case was not a capi tal investment, it was incurred not to distribute but to increase and in that sense to earn the profits. On the other hand, if it is to be held that such expen ses are not deductible, what is to be said of the costs of audit which the Compa nies Acts make necessary, or of that part of the cost of book-keeping which is used in the preparation of such an audit, or of accounts for taxation? They are not incur red for the purpose of earning the profits of the trade in the limited sense conten ded for by the Crown."

20. It is clear, therefore, that one point of view is that expenses incurred in conducting proceedings connected with the assessment of tax are not deductible expenses inasmuch as such expenses are incurred by the assessee not wholly and exclusively for the purpose of his trade but partly, if not mainly, as a tax-payer. and the other point of view is that this expenditure is incurred for the purpose of carrying on and earning profits in the trade, for a reduction in the amount of tax increases the fund in the trader's hands after tax is paid and promotes the carrying on of his trade and the earning of his trading profits.

21. We have given our most anxious consideration to both the points of view and have reached the conclusion that the view expressed by Viscount Simon with whom Lord Oaksey had concurred should be accepted by us. In this conclusion we derive some support from certain obser vations of our Supreme Court which may, at this stage, be fruitfully referred to.

22. In the earlier part of this judg ment the difference, so far as Section 10 (2) (xv) is concerned between its provi sions up to 1939 and the provisions sub sequent thereto has been noted. We have seen that previously what was expenditure "incurred solely for purpose of earn ing such profits or gains" is now an ex penditure "laid out or expended wholly and exclusively for purpose of such busi ness, profession or vocation."

23. Our Supreme Court in *Commissioner of Income-tax Kerala v. Malayalam Plantations Ltd*[4]*.,* has said that the expres sion "for the purpose of business" is wider in scope than the expression "for purposes of earning profits". The Supreme Court says further that the purpose shall be for the purpose of the business that is to say, the expenditure incurred shall be for the carrying on of the business and the assessee shall in cur it in his capacity as a person carry ing on the business.

24. Then in *Sree Meenakshi Mills Ltd. v. Commissioner of Income-tax, Madras*[5]*,* their

[4]53 ITR 140
[5]63 ITR 207

Lordships of the Supreme Court have said that the expenditure incurred not with a view to direct

and immediate benefit for the purposes of commercial expediency and in order indirectly to facilitate the carrying on of business is an expenditure laid out wholly and ex clusively for purposes of the trade. In this case the Supreme Court also said that expenditure on civil litigation com menced or carried on by an assessee for protecting the business is an admissible expenditure under Section 10 (2) (xv), provided other conditions are fulfilled, even though the expenditure does not directly relate to the earning of the income.

25. Applying these principles laid down by the Supreme Court to the facts of the instant reference, it seems to us that expenses incurred for conducting proceedings before the Income-tax autho rities may not be apparently related to the assessee's trading activities but may be justifiably necessary for increasing the assessee's net profits or for the car rying on of the business with larger funds at the disposal of the assessee. From this point of view these expenses are expenses 'for the purpose of the business' in the wider sense the Supreme Court has understood this expression.

26. We have, however, to consider the Supreme Court's decision in *Travencore Titanium Product Ltd. v. Commissioner of Income-tax, Kerala*[6], In this case the question arose as to whether the amount of Wealth-tax paid by an assessee was busi ness expenditure deductible under Sec tion 10 (2) (xv) of the Wealth-tax Act, 1957. The Supreme Court expresses the view that the nature of the expenditure or outgoing must be adjudged in the light of accepted commercial practice and trading principles; the expenditure must be incidental to the business and must be necessitated or justified by commercial expediency; it must be directly and intimately connected with the business and must be laid out by the tax-payer in his character as a trader; and to be a permissible deduction, there must be direct and intimate connection between the expenditure and the business, i. e., between the expenditure and the charac ter of the assessee as a trader and not as owner of assets, even if they are assets of the business.

27. Mr. Mukherjee, learned Counsel for the Commissioner, contends that this judgment of the Supreme Court ought to be considered as an authority for the proposition that taxes are paid by an as sessee not in his capacity as a trader but in his character as a tax-payer. Mr. Mukherjee further contends that the principles applicable to Wealth-tax equally apply to Income-tax.

28. We are unable to support these contentions. The reason for the Supreme Court's decision has been pointed out in the last but one paragraph of its judgment in Travencore Titanium Products Ltd.'s case, (1966) 60 ITR 277 . The paragraph runs thus : -

> "In the light of the principles the amount of tax paid on the net wealth of an assessee under the Wealth-tax Act is not a permissible deduction under Section 10 (2)(xv) of the Indian Income-tax Act in his assessment to income-tax, for tax is imposed under the Wealth-tax Act on the owner of assets and not on any com mercial activity. The charge of the tax is the same, whether the assets are part of or

[6]60 ITR 277

> used in the trading organization of the owner or are merely owned by him. The assets of the tax-payer, incorpora ted or not, become chargeable to tax because they are owned by him and not because they are used by him in the business."

29. To our mind these observations of their Lordships of the Supreme Court constitute a complete answer to the con tentions of learned Counsel for the Com missioner. In our view, as income-tax is levied on the amount of profits earned, the expenses incurred for ascertaining the correct amount of income-tax pay able by an assessee are expenses deduc tible under Section 10 (2) (xv) of the Act of 1922.

30. In *Mannalal Ratanlal v. Commis sioner of Income-tax, Calcutta*[7] this Court following the judgment of the Patna High Court in *Maharajadhiraj Sir Kameswar Singh v. Commissioner of Income-tax*[8], has held that the interest which an assessee had paid on the amount borrowed for payment of Income-tax, is not deductible from the assessee's net income. The principal rea son for the decision was that payment of Income-tax was not an expenditure for the purpose of earning profits; it was, on the contrary, a case of application of profits after they had been earned and not an expenditure necessary to earn such pro fits. From this point of view interest on money borrowed for payment of tax was not considered to be a legitimate deduction in computing business profits. Here, the facts are different. The deduction that is claimed, is neither of the amount paid as Income-tax nor of the interest paid on any amount borrowed for payment of Income-tax. Here the expenses were in curred for saving, preserving or protecting a portion of the income arising out of the assessee's business. In other words, these expenses enabled the as sessee to make its legitimate profits. They, were, therefore, laid out wholly and ex clusively for the assessee's business.

31. For reasons stated in this judg ment our answer to the question framed is that the Tribunal was correct in hold ing that the sum of Rs. 16,000 paid by the assessee as professional fees to its tax consultants was an admissible deduc tion under Section 10 (2) (xv) of the Indian Income-tax Act, 1922. There would be no order as to costs.

Chatterjee, J.

32. I agree.

Reference answered.

[7](1965) 58 ITR 84 (Cal)
[8]42 ITR 774: AIR 1960 Pat 31