**CALCUTTA HIGH COURT**

Commissioner of Wealth-Tax

Vs

Mohan Lal Nopany

(P Mukharji, C.J. Sabyasachi Mukharji , J.)

19.09.1969

**JUDGMENT**

**Sabyasachi Mukharji, J.**

1. This reference arises out of the assessment made under the Wealth-tax Act for the assessment year 1959-60, for which the corresponding valuation date was 31st March, 1959. The assessee is an individual holding certain shares in Messrs. Hind Mills Ltd. and Shree Hanuman Sugar Mills Ltd. These shares are not quoted in the stock exchange. Before the Wealth-tax Officer it was not disputed that the break-up value of the shares of these companies computed on the basis of the balance-sheets should be taken as the market values thereof. The assessee, however, contended before the Wealth-tax Officer that in computing the break-up value, of the shares of Messrs. Hind Mills Ltd. and Sri Hanuman Sugar Mills Ltd., the depreciable assets of the two companies should be taken at their written down values as per income-tax records. The Tribunal was of the opinion that no depreciation had been shown in the balance-sheets and, therefore, it would be unrealistic to take the book value of the assets. The Tribunal came to the conclusion that the prospective buyers of the shares would take into consideration the fact that the assets of the companies concerned had depreciated year after year due to use, although no depreciation had been shown in the balance-sheets. The Tribunal, therefore, directed that the written down values of such depreciable assets should be taken instead of the values shown in the respective balance-sheets.

2. Another contention was put forward by the assessee that the dividends proposed but not declared by Messrs. Hind Agents Private Ltd. and Shri Hanuman Sugar Mills Ltd., as on the relevant valuation date should be deducted from the gross value of the assets of the companies. The Tribunal was of the opinion that they should be so deducted and directed the Wealth-tax Officer to recompute the break-up value of the shares after allowing the dividends proposed by the companies but not declared on or before the relevant valuation date.

3. The third contention of the assessee before the Tribunal was that in computing the break-up value of the shares of Sri Hanuman Sugar Mills Ltd., a further deduction should be allowed from the gross value of the assets in respect of the agricultural income-tax, amounting to Rs. 1,63,385, which had been paid under protest to the Bihar Government on account of the agricultural income-tax assessment as shown in the balance-sheet. The Tribunal was of the opinion that this sum of Rs. 1,63,385 was certainly a factor liable to be taken into account by the prospective buyers of the shares while estimating the market value. The Tribunal, therefore, directed that Rs. 1,63,385 be left out of the assets while computing the break-up "value of the shares of the company.

4. The Tribunal has referred under Section 27(1) of the Wealth-tax Act, 1957, the following questions to this court:

"1. Whether, on the facts and in the circumstances of the case, in determining the break-up value of the shares held by the assessee in Messrs. Hind Mills Ltd. and Messrs. Shree Hanuman Sugar Mills Ltd., the Income-tax Tribunal was justified in holding that the valuation of the depreciable assets of the companies concerned should be based on their income-tax written down values in place of their balance-sheet values ?

2. Whether, on the facts and in the circumstances of the case, in determining the break up value of the shares held by the assessee in Messrs. Hind Agents (P.) Ltd. and Messrs. Shree Hanuman Sugar Mills Ltd., the Income-tax Tribunal was justified in holding that the liabilities of the companies concerned for the dividends proposed but not declared as at the valuation date should also be deducted from the gross value of the assets of the companies?

3. Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that in determining the break-up value of the shares in Sree Hanuman Sugar Mills Ltd. Agricultural income-tax paid lay the said company amounting to Rs. 1,63,385 is liable to be deducted from the gross value of the assets ?"

5. Regarding question No. 1 it was contended on behalf of the revenue that in this case the Tribunal was not justified in directing that the value of the depreciable assets of the companies should be based on their written down value instead of their balance-sheet values. It was contended that depreciation under the Income-tax Act is allowed on the statutory basis and it has not necessarily any correlation with the market value of the assets. Therefore, it was submitted, that in computing the market value of the assets, there is no warrant for treating the written down value in the income-tax assessment of a particular asset as the basis. Before this contention is considered, it has to be borne in mind that the assets are depreciable assets. Therefore, the

position seems to be admitted that these are assets which, with the passage of time, depreciate. It also appears from the order of the Tribunal that in the balance-sheets depreciation of these assets have not been provided for. The Tribunal in its order in this connection relied upon the judgment of the Tribunal in the case of another shareholder of the said company, i.e., Sri Narayan Prasad Nopany, relating to the assessment year 1959-60. The said order of the Tribunal in the case of Sri Narayan Prasad Nopany has been annexed with the statement of the case and sent to this court. At page 8 of the paper book it has been observed that:

"It is stated that the two companies did not provide for either any depreciation or full depreciation due to paucity of profit."

6. It does not appear that before the Tribunal this statement of fact was challenged. The position, therefore, is that in the balance-sheet no depreciation has been provided for and it has been stated that the depreciation has not been provided for because of paucity of funds. It is further apparent that these assets are depreciable in nature. Therefore, there is evidence enough to hold that the balance-sheets do not correctly represent the value of those assets. There was the written down value of the assets in the income-tax assessment. There was no evidence before the Tribunal adduced by the revenue or by anybody that the written down value as shown in the income-tax assessments did not represent the correct position or had no correlation with the market value. In the background of this position, we have to consider what are the objective factors before the Tribunal which the Tribunal should have taken into consideration as operating in the mind of a hypothetical buyer in the imaginary market valuing the shares of this, company. The question recently came up for consideration before this court in Wealth-tax Reference No. 223 of 1966 (Commissioner of Wealth-tax v. Srimathi Radha Debi M. Nopany,) (unreported), where, delivering the judgment of this court, my Lord observed as follows:

"The first qualification is that valuation of assets under Section 7 of the Wealth-tax Act has for its criteria the price that the asset, according to the opinion of the Wealth-tax Officer, will fetch in the open market on the valuation date and not the written down value according to the books or balance-sheet of the company of the assessee. The written down value may or may not be the price in the open market. The second qualification is that the income-tax written down value under Section 10 of the Income-tax Act may not also represent the price in the open market, because the purpose and object under Section 10 of the Income-tax Act are different from the purpose and object of Section 7 of the Wealth-tax Act. The third qualification relates to the valuation of shares as assets under the Wealth-tax Act and the practical difficulty in reflecting the depreciation to physical assets, like building machinery, plant or furniture', under Section 10(2)(vi) of the Income-tax Act, in the valuation of assets like 'shares' either by following the principles of fixing a deceptive percentage or deceptive proportion."

7. In the above case, in view of the fact that there was statement in the balance-sheet that the depreciation 'had not been shown due to paucity of profit and in view of the fact that there was no evidence before the Tribunal to come to the conclusion that the written down value did not represent the market value, this court came to the conclusion that the Tribunal was justified in proceeding to take into consideration that the prospective buyer would be guided by the written down value.

8. Mr. Pal, appearing for the revenue, drew our attention to two judgments of the Supreme Court in Commissioner of Wealth-tax v. Tungabhadra Industries Ltd., . and Commissioner of Wealth-tax v. Aluminium Corporation of India Ltd. (Civil Appeal No. 1596 of 1968), for the argument that the values put in the balance-sheets should be taken as the basis of valuation. It has to be borne in mind that both the cases were concerned with the question of valuing the assets of the companies who themselves were the assessees and whose assets were being valued under Section 7(2)(a) of the Wealth-tax Act, 1957. The company is, undoubtedly, bound by the balance-sheets as held by the Supreme Court unless the company adduces evidence to the effect that the balance-sheets do not, represent the correct position. But even then the Supreme Court observed as follows:

"It is of course open to the assessee in any particular case to establish after producing relevant materials that the value given of the fixed assets in the balance-sheet is artificially inflated. It is also open to the assessee to establish by acceptable reasons that the written down value of any particular asset represents the proper value of the asset on the relevant valuation date. In the absence of any material produced by the assessee to demonstrate that the written down value is the Teal value, the Wealth-tax Officer would be justified in a normal case in taking the value given by the assessee itself to its fixed assets in its balance-sheet for the relevant year as the real value of the assets for the purposes of the wealth-tax. It is a question of fact in each case as to whether the depreciation has to be taken into account in ascertaining the true value of the assets. The onus of proof is on the assessee who must produce reliable material to show that the written down value of the assets and not the balance-sheet value is the true value. If, therefore, the assessee merely claims that the written down value of the assets should be adopted, but fails to produce any material to show that the written down value is the true value, the Wealth-tax Officer is justified in rejecting the claim and adopting the values shown by the assessee himself in his balance-sheet as the true value of his assets."

9. In this case, there were materials on record to indicate that the balance-sheets did not represent the correct value. In that view of the matter, it cannot be said that the Tribunal was not justified in taking the written down value as one of the factors in the facts and circumstances of this case which a hypothetical buyer in the imaginary market would take into consideration in determining

the market value of these assets under Section 7(i) of the Wealth-tax Act, 1957. Therefore, in view of the judgment of this court in the case of Commissioner of Wealth-tax v. Srimathi Radha Debi M. Nopany (unreported), Since . and the facts discussed before, we answer question No. 1 in the affirmative and in favour of the assessee.

10. In view of the judgment of the Supreme Court in the case of Keshoram Industries & Cotton Mills Ltd., and the decision of this court in Commissioner of Wealth-tax v. Rajendra Singh Singhi, . question No. 2 must be answered in the negative and in favour of the revenue. Indeed, on this question no argument was advanced by the parties before us.

11. The third question canvassed before us is of a controversial nature. It appears from the order of the Wealth-tax Officer that the assessee claimed deduction of Rs. 3,50,771 for agricultural income-tax as "claimed but not provided." The Wealth-tax Officer in his order observed that the footnote to the balance-sheet as on September 30, 1958, showed as follows:

"The company has been assessed to agricultural income-tax for the accounting years 1951-52 and 1952-53, amounting to Rs. 5,14,156 towards which Rs. 1,63,385 have been advanced by the company under protest and the references have been decided in favour of the company. However, the department has preferred appeals against the same."

12. According to the Wealth-tax Officer, as on September 30, 1958, there was not only no liability of the company, but the company was also entitled to a refund of Rs. 1,63,385, which it had earlier advanced under protest. The Wealth-tax Officer, therefore, disallowed the claim for Rs. 3,50,771 and further added back the refund of Rs. 1,63,385 due to the company for arriving at the break-up value of its ordinary shares as on 30th September, 1958. The amount thus added was Rs. 5,14,156. From this, as mentioned before, the assessee had preferred an appeal before the Appellate Assistant Commissioner and the Appellate Assistant Commissioner in his order observed as follows:

"Agricultural income-tax was a liability incurred in relation to the exempt assets. Since the value of those assets has also not been taken into consideration, obviously no deduction could be allowed in respect of the liability arising as a result of owning those assets. Moreover, it would be seen that on the relevant valuation date this liability did not exist since the Board of Revenue had decided in favour of the company. Incidentally, it was contended that the amount paid as agricultural income-tax should have at least been deducted in determining the value of the gross assets. Now, this payment of agricultural income-tax as on the relevant valuation date was not a fictitious asset. It was a real asset in the hands of the company and which amount the appellant-company was entitled to receive back from the Government. Obviously, the value of this real

asset was includible in determining the surplus."

13. When the matter came before the Tribunal, the Tribunal was of the opinion that the said sum of Rs. 1,63,385 paid to the Government by the said company on account of agricultural income-tax assessment should be deducted from the assets while computing the break up value of its shares. The Tribunal in this connection relied on the order of the Tribunal in Wealth-tax Appeal No. 380 of 1962-63, relating to the assessment year 1959-60. The said order as mentioned before has also been annexed to the statement in the case. It appears that in the balance-sheets of the company there was a note to the following effect:

"The company has been assessed to agricultural income-tax for the accounting years 1951-52 and 1952-53, amounting to Rs. 5,14,156 towards which Rs. 1,63,385 had been advanced by the company under protest and the reference has been decided in favour of the company. However, the department has again preferred appeal against the same."

14. The Tribunal has observed that on the assets side of the balance-sheet it is shown that the advance payment of Rs. 1,63,385 has been paid to the Government on account of agricultural income-tax assessment. The Tribunal also observed that on the liabilities side no provision existed in respect of the demand of Rs. 5,14,156 made by the said agricultural income-tax department. The Tribunal dealing with the contention of the assessee on this point in the case of Sri Narayan Prasad Nopany observed as follows:

"We agree with the learned counsel's submission that, in these circumstances, the contingencies of the department succeeding in appeal cannot be left out of the amount while valuing the assets. We would presume that the assessee has more than 50 : 50 chance of the issue being decided in his favour. As against the liability of Rs. 5,14,156 we would estimate the value of the liability at Rs. 1,63,385, being the sum already paid to the Government and not yet refunded to the assessee. Whether the liability amounts to a debt or not, it is certainly a factor to be taken into account by the prospective buyer of the undertaking while estimating its market value. Having regard to these aspects we direct the sum of Rs. 1,63,385 be left out of the assets while computing the break-up value of the shares of Shree Hanuman Sugar Mills Ltd."

15. It was contended by Mr. Pal on behalf of the revenue that in this case we are concerned with the value of the assets on the relevant valuation date and on the relevant valuation date there was no existing liability for the payment of this sum of Rs. 1,63,385 to the Government on account of the Bihar agricultural income-tax. It was urged that the company whose shares were involved in this case was entitled to a refund of the said sum of Rs. 1,63,385. Indeed, this sum of Rs. 1,63,385 has been shown on the assets side of the balance-sheet. In these circumstances, Mr. Pal

urged that the Tribunal was not justified in coming to the conclusion that this sum should be deducted in computing the value of the assets of the company to find out the market value of the shares. Mrs. Seth, for the assessee, on the other hand contended that we must have regard to the actuality of the situation and according to her the pending litigation was a factor which would be taken into calculation by the prospective buyer and was a factor which should be taken into consideration in estimating the market value of these assets. It was further urged that even if it was a contingent liability, such as a liability of the nature of refund from the Government, it merited consideration in calculating the factors that operated in the mind of the buyer of the shares. Reliance was placed by counsel for the assessee on the decision of this court in the case of Gift-tax Officer, Calcutta v. Kastur Chand Jain, [1964] 53 I.T.R. 411 (Cal.) That was a case which had to deal with the valuation of certain shares under the Gift-tax Act. The court observed that when the hares were to be valued by reference to the company's assets the valuations must be done on the real wealth of the company and not on its artificial wealth as computed under Section 2(m) of the Wealth-tax Act. There the assessee had gifted to his daughter some shares of two private companies, the articles of association of both of which contained provisions restricting the right to transfer of shares. They were not quoted in the stock exchange and could not be bought in the open market. In computing the value of the shares under Section 15(3) read with Rule 10(2), the Gift-tax Officer added the following two items, namely, (i) provision for taxation, and (ii) proposed dividend. Thereupon, an application was made under Article 226 of the Constitution of India. The Bench decision of this court held that though the amount of tax liability was uncertain on the date of the gift it was necessary to make a just and fair allowance for the liability. The provision of taxation made by the company was a fair estimate of the tax liability and the amount so set apart was liable to be deducted. It was further held that in computing the value of shares by reference to the value of the company's assets no deduction or allowance could be made for dividends not declared on the date of the gift. The amount set apart as, proposed dividend could not therefore be deducted.

16. It has to be borne in mind that here under Section 7(1) of the Wealth-tax Act, when the wealth-tax authorities are considering the market value of the shares by following the break-up method of the assets of the company it is not possible to lay down the precise factors which would operate in the minds of prospective buyers in that imaginary market. All that one can do is to consider what are the factors which reasonably a prospective buyer might consider and then consider how these factors affect the value of the shares. It has been urged that doubtful debts have often been considered to be factors which would dimmish the value of the assets of the company. Reliance was placed on the decision of this court in the case of Commissioner of Wealth-tax v. Rajendra Singh Singhi for the proposition that in determining the market value by following the break-up method it was necessary that deduction of the value should be made on

account of bad and doubtful debts. It is, however, necessary to remember in this case that in the balance-sheet it has not been mentioned, at least it does not appear to have been mentioned that this sum of Rs. 1,63,385 was considered to be bad and doubtful. It does not also appear that the company considered this debt to be a contingent asset. In the balance-sheet no doubt was indicated about the company's right and the ability to get this money back from the Government. It has, however, been urged that the fact that in the balance-sheet there was a statement that the Government had preferred an appeal, but that statement has to be taken into consideration with the fact that on the relevant valuation date there was no existing liability against the company. On the other hand, the company has shown as one of its assets the sum which is refundable by the Government, namely, Rs. 1,63,385. There is no indication in the balance-sheet of any factor, which a prospective buyer might take into consideration in determining the value, that the company considered either that the Government would succeed or that the claim of the company to recover the sum from the Government to be of doubtful nature. These are the factors which are available to a prospective buyer from the balance-sheet. It is also to be borne in mind that this is not a case where there is a litigation on the shares. It is true that there was an attempt by the Government to impose certain additional tax but that claim so far as the liability existed on the relevant valuation date had been negatived by the appropriate authorities. There was no existing factor, on the relevant valuation date, which would go to show that the statement in the balance-sheet that this was the asset of the company, namely, a sum of Rs. 1,63,385, was not a correct estimate. This being the position, there is no basis for saying that this is a factor which a prospective buyer is likely to take into consideration in estimating the market value. A contingent liability or a bad debt is a factor which a prospective buyer would take into consideration. In order to influence the mind of a prospective buyer the facts must be as on the valuation date. Here, on the balance-sheet which is mainly brought to the notice of the prospective buyer there is no indication of anything doubtful about recovering this sum of Rs. 1,63,385 from the Government, Counsel for the assessee also drew our attention to a decision of the Supreme Court in the case of Commissioner of Wealth-tax v. Standard Vacuum Oil Co. Ltd., . where it was held that where a notice under Section 18A of the Indian Income-tax Act, 1922, was concerned, the amounts mentioned in the said notices were debts owed within the meaning of Section 2(m) of the Wealth-tax Act on the valuation dates and had to be deducted in computing the net wealth of the respondents. Here, the company was claiming deduction from its assets. But the service of the notice under Section 18A of the Income-tax Act on the company was held to be fastening of the liability upon the company, because the company had to discharge it. Here, the position is, as mentioned before, on the relevant valuation date, there was no existing liability and as such the mere possibility of a liability being fastened on a future date is not a factor which can be taken into consideration as entering into the minds of a prospective buyer in valuing the shares in the break-up method. The Tribunal has observed that there was 50 : 50 chance of the matter being

decided in favour of the assessee. There is, however, no material either in the balance-sheet or before us to consider what were the merits or the chances of success in the appeal preferred by the department. In that view of the matter the agricultural income-tax paid by the company in respect of which there was no existing liability on the relevant valuation date and which the company was claiming on its assets side cannot be deducted from the gross value of the assets of the company. The question No. 3, therefore, must be answered in the negative, and against the assessee.

17. Each party will pay and bear its own costs.

P.B. Mukharji, J.

I agree.

18. Wealth has many intrinsic and extrinsic ironies. This wealth-tax reference has, however, its special ironies. Here, both the assessee and the taxing authorities disown themselves. The assessee contends that in valuing shares of a company which he holds, the company's own balance-sheet should not be held against him. Taxing authorities who have themselves granted allowance to the assessee in income-tax proceedings and assessments, contended that the written down value as per their own income-tax records should not be held against the taxing authorities. The irony is that the income-tax authorities want to rely on the balance-sheet of the company and the assessee holding the company's shares wants to rely on the income-tax records.

19. Legal sophistication developing about the valuation of assets under Section 7 of the Wealth-tax Act is producing many legal myths. This section simply enough said, "value of any asset other than cash, shall be estimated to be the price which in the opinion of the Wealth-tax Officer it would fetch if sold in the open market on the valuation date". But the imposing legal and judicial foliage that has grown around that section is deceptive and conceals many thorns specially with regard to, (1) opinion of the Wealth-tax Officer, and (2) the open market.

20. The first controversy is what happens when there is or can be in fact no "open market". In this case the fact is that the assessee who holds shares in Messrs. Hind Mills Ltd. has these shares which are not admittedly quoted on the stock exchange and there is no open market as such for such shares. While the market does not remain open, law opens the field of imagination. The answer is said to be to imagine hypothetical market, a hypothetical seller and a hypothetical purchaser and then fix what must necessarily be the hypothetical price. But in the process, the law still says that one has to look for reality in the illusory market with illusory buyer and illusory purchaser trying to buy shares which have no market. The situation is ideal where the normally pent up legal romance gets its chance to operate.

21. Many theories have been advanced in law for valuation of such shares. First, there is the book value or the balance-sheet value. Then there is the written down depreciation value in income-tax proceedings. The two recent, as yet unreported,, decisions of the Supreme Court in theCommissioner of Wealth-tax v. Tungabhadra Industries Ltd., where the judgment was delivered in Civil Appeals Nos. 1629-1631 of 1969 on the 8th August, 1969, and Commissioner of Wealth-tax v. Aluminium Corporation of India Ltd., in Civil Appeal No. 1596 of 1968, dated the 7th August, 1969, have re-examined these questions and the competing theories between company's balance-sheet value and the income-tax written down value. In Tungabhadra's case, the Supreme Court has said there:

"In the absence of any material produced by the assessee to demonstrate that the written down value is the real value, the Wealth-tax Officer would be justified in a normal case in taking the value given by the assessee itself to its fixed assets in its balance-sheet for the relevant year as the real value of the assets for the purposes of the wealth-tax. It is a question of fact in each case as to whether the depreciation has to be taken into account in ascertaining the true value of the assets. The onus of proof is on the assessee who must produce reliable material to show that the written down value of the assets and not the balance-sheet value is the true value. If, therefore, the assessee merely claims that the written down value of the assets should be adopted but fails to produce any material to show that the written down value is the true value, the Wealth-tax Officer is justified in rejecting the claim and adopting the values shown by the assessee himself in his balance-sheet as the true value of his assets."

22. That is the latest pronouncement of the Supreme Court laying down the law on the subject. It will be seen that the emphasis there is that what would be the real value has been said to be a question of fact in each case, and, secondly, that the onus is on the assessee to show that the written down value represents the true value and not the balance-sheet value. In. the recent decision of a Bench of this court to which reference has been made by my learned brother in Commissioner of Wealth-tax v. Smt. Radha Debi M. Nopany, where the judgment was delivered by us on the 15th. July, 1969, it is decided that neither the balance-sheet nor the written down value by itself may be a conclusive test on the facts of a particular case and it is open to the assessee or the revenue to challenge any one of these tests on the particular facts of a particular case. The question of onus would depend on whether on the records in each case there are facts which suggest that one or the other test should be applied.

23. But the fact that I desire to emphasise in this case is that, in valuing assets under Section 7 of the Wealth-tax Act, the object of the Wealth-tax Act should never be missed. The object is to find the value in the open market. Balance-sheet value and the written down value are not the only two methods of valuing the asset. I do not read Section 7 of the Wealth-tax Act to mean that the

valuation is confined always and invariably to these two methods of valuation. It is open to the Wealth-tax Officer in search of value in the open market, even in hypothetical cases, to consider any relevant economic factor. Many factors determine the value of an asset like the share in a company. The value of shares fluctuates in the market due to many reasons--political and economic. If in any particular case the Wealth-tax Officer finds that the valuation of the shares on the basis of the balance-sheet will not be justified for reasons which can be tested in court or in the other case where the Wealth-tax Officer for reasons which again can be tested in court finds that the written down value in income-tax proceedings is not a proper guide for the valuation, then he would be right in rejecting it.

24. What exactly is the bone of contention here? The contention plainly is that it is stated that the two companies did not provide for any depreciation or full depreciation due to paucity of profit. The taxing authorities and the Tribunal came to the conclusion that normally depreciation allowed under the Income-tax Act was a reasonable measure of the wear and tear of the plant, machinery and building while used for the purpose of business and therefore, it would be quite correct to base the valuation of the fixed assets on the basis of the income-tax written down value as on the closing date of the accounting years of the company. On that finding I fail to see what remains in fact and law to hold that this decision of the Tribunal is wrong. Balance-sheet has not shown the depreciation, an obvious fact with reference to physical assets. There may be hundred and one reasons in the balance-sheet not to show it. One reason stated very clearly in the order of the Tribunal is that it was due to paucity of profit. That fact is evidence enough in my view to show that the balance-sheet as a prima facie evidence is displaced in favour of the written down value in the income-tax proceedings. The balance-sheet does show that for the particular reason of the paucity of profit the depreciation has not been allowed. By natural process, physical assets have a depreciation and the court certainly will in appropriate cases have every consideration for that fact. But where there is a finding that it was due to paucity of profit that depreciation was not shown in the balance-sheet, then the onus is upon the taxing authorities, in my opinion, to show that that reason of paucity of profits is wrong. The argument was advanced in this case that the management did not consider it prudent to depreciate those particular assets and the auditors had certified that the value of those assets, as appearing in the balance-sheet, was fair and correct. If indeed a prudent management thought it so, then the .statement of the prudent management must be taken as a whole and not dissected in the manner it has been contended. Then the management in its prudence thought that the depreciation should not be mentioned in the balance-sheet on the ground of paucity of profits. Absence of depreciation, therefore, in the balance-sheet must be read with the express finding that it was due to the paucity of profit and certified by the auditor as such. It, therefore, should not be taken to mean only that the prudent management thought either there was no depreciation in fact or that the depreciation should not

be allowed in the balance-sheet under any circumstances. It was not shown on the express ground of paucity of profits. That was the point which we emphasized in our recent decision in Commissioner of Wealth-tax v. Smt. Radha Debi M. Nopany (unreported).

25. The other question in this reference is about the payment of agricultural income-tax and whether the Tribunal was right in holding that in determining the break-up value of the shares of Sree Hanuman Sugar Mills Ltd., agricultural income-tax paid by the said company amounting to Rs. 1,63,385 was liable to be deducted from the gross value of the assets.

26. Here, at the foot the balance-sheet of Sree Hanuman Sugar Mills Ltd., it is shown that "the company has been assessed to agricultural income-tax for the accounting years 1951-52 and 1952-53, amounting to Rs. 5,14,156, towards which Rs. 1,63,385 have been advanced by the company under protest and the references have been decided in favour of the company. However, the department has again preferred appeals against the same ".

27. This question merely raises the effect in substance of an agricultural income-tax paid out of the till of the company but legally refundable by reason of the proceedings at the intermediate stage which again is covered by a pending proceeding, whose final results are unknown and not settled.

28. Certain facts, however, are plain enough on this point. The money has been paid as tax. It has gone out of the till of the company. The assets of the company have been denuded to the extent of the money paid out at least for the time being. In the intermediate stage, the assessee wins but the wealth-tax authorities have appealed but the money paid as tax has not been returned to the assessee. The money continues to be out of the till of the company. The company's assets are without that money. Nobody knows what would ultimately happen in the appeal and what is the position of such a tax paid.

29. Sufficient consideration has not perhaps been paid to one aspect of the problem, and that is, that in considering the valuation in the open market in such a case, a litigated asset necessarily fetches less value in open market than an unlitigated asset. The doctrine is a familiar notion in ordinary conveyancing and in commercial transactions where a purchaser buys litigation. The test again is as laid down by section of the Wealth-tax Act: what is the value which shall be estimated to be the price which, in the opinion of the Wealth-tax Officer, it will fetch if sold in the open market on the valuation date? The crucial date for facts is the date of valuation. The valuation date here is on 30th March, 1959. The actual records of the agricultural income-tax are not before us and not part of the records of this case and that is the handicap.

30. With these observations, I agree with the answers given and the orders proposed by my

learned brother.