BOMBAY HIGH COURT

Commissioner of Income-Tax

Vs

Colour-Chem Ltd

(R Kantawala, C.J. V Tulzapurkar , J.)

15.03.1974

JUDGMENT

Tulzapurkar, J.

1. Two questions have been referred to this court under section 66(1) of the Indian Income-tax Act, 1922, for our determination and these are as follows :

> "(1) Whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that the roadways inside the factory premises of the assessee-company come in the category of 'building' and as such are entitled to depreciation under section 10(2)(vi) of the Indian Income-tax Act, 1922 ?
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> (2) If the answer to question No. 1 is in negative, whether, on the facts and in the circumstances of the case, the roadways in the factory premises would be entitled to depreciation as 'plant' under section 10(2)(vi) of the Act ?

2. The short facts leading to these question may be stated :The question relate to the assessment year 1961-62, the corresponding accounting period being the one ended on 31st March, 1961. The assessee is a public limited company carrying on business in the manufacture and sale of pigments, pigment emulsion, distempers and other chemicals, dyes etc. In the assessment proceedings for the assessment year 1961-62, the company claimed depreciation allowance on the roadways inside the factory premises of the company. It appears that the factory is situate on land admeasuring 25 acres and the company had spent a sum of Rs. 1,85,649 on the layout of the roads inside the factory premises linking the various factory buildings. The cost of the roads was included in the figures relating to buildings, and depreciation was claimed at the rate of 2 1/2% on the cost of the roads at the same rate as applicable to buildings. The assessee-company claimed depreciation allowance on the ground that the roads were of concrete and were necessary for transport of raw materials and finished products. The Income-tax Officer rejected the claim

for depreciation holding that the roadways could not be considered as part of the buildings. The Appellate Assistant Commissioner agreed with this view. In the further appeal that was carried to the Tribunal an alternative contention was also raised that if the roadways did not form part of the factory buildings they should be regarded as "plant" for the purposes of allowing depreciation. The Tribunal upheld the contention that the roadways formed part of the factory buildings, but did not accept the alternative contention that they constituted plant. The Judicial Member and the Accountant Member passed separate orders each setting out his own reasons for coming to the same conclusion that the roadways did not constitute plant but could be regarded as building for the purposes of granting depreciation allowance. At the instance of the Commissioner of Income-tax, Bombay City, the first question mentioned above has been referred to us our decision, while the second has been referred at the instance of the assessee.

3. Mr. Hajarnavis, for the revenue, has contended before us that the roads or roadways, in respect of the cost whereof depreciation allowances was sought by the assessee-company, would be "roads" and could not be regarded as "buildings" or any construction forming part of a building; there was neither any structure nor super-structure on the land on which the roads had been laid by the assessee-company during the year under consideration. He pointed out that depreciation allowance is claimable by an assessee only in respect of specified assets mentioned in section 10(2)(vi) and that provision runs as follows :

> "10. (2) Such profits or gains shall be computed after making the following allowances, namely :-.....
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> (vi) in respect of depreciation of such buildings, machinery, plant, or furniture being the property of the assessee, a sum equivalent (where the assets are ships other than ships ordinarily plying on inland waters) to such percentage on the original cost thereof to the assessee as may in any case or class of cases be prescribed."

4. According to Mr. Hajarnavis, in the first place, the assets must be those indicated in sub-clause (vi), namely, buildings, machinery, plant or furniture and, secondly, the expression "such" that precedes the assets specified must, in view of sub-clause (iv) of section 10(2), mean buildings, machinery, plant or furniture used for the purposes of business. He pointed out that roads or roadways that have been laid out inside the factory premises of the assessee are not one of the specified assets and the attempt of the assessee to claim depreciation thereon by suggesting that the roads or roadways constitute "buildings" cannot succeed, for, the normal concept of a building or buildings is referable to something that is constructed as a structure or superstructure on land and, therefore, no depreciation allowance can be allowed in respect of the roadways that have been laid out by the assessee-company in its factory premises. He further pointed out that the expression "building" has not been defined in the Act and, therefore, the ordinary dictionary

meaning of the expression will have to be taken into account and, according to the Shorter Oxford Dictionary, the expression "building" means "that which is built; a structure", and ordinarily any structure in its popular sense would mean a structure which has walls and a roof and in this sense the roadways constructed by the assessee-company cannot be regarded as falling in the category of building or buildings specified in sub-clause (vi) of section 10(2). He also relied upon a decision of the Supreme Court in the case of *Commissioner of Income-tax v. Alps Theatre* . He pointed out that in that case the expression "building" occurring in section 10(2)(vi) of the Act came up for consideration and it was held that the word "building" in the said relevant provisions meant structures and did not include the site. In that case depreciation under section 10(2)(vi) of the Act was claimed on the cost of land on which the building had been erected but the Supreme Court took the view that depreciation allowance could be allowed only on the cost of super-structure and not on the cost of the site on which the super-structure had been erected. He, therefore, contended that in this case also the roads or roadways which had been laid out by the assessee-company should be held as not falling in the category of building or buildings mentioned in the sub-clause (vi) of section 10(2) of the Act and depreciation allowance should be disallowed.

5. On the other hand, Mr. Kaka appearing for the assessee has contended that the expression "building or buildings" occurring in sub-clause (vi) of section 10(2) of the Act cannot be given such a restricted meaning but must be given a wide meaning sufficient to include any adjunct or a thing appurtenant to a factory building and depreciation on such item should be allowed under section 10(2) of the Act. He further contended that the expression building or buildings will have to be understood in the relation to particular subject-matter dealt with by the relevant provision in the concerned enactment and since in this case it was not disputed that the roads or roadways had been laid out by the assessee-company within the factory premises which comprised a total area of 25 acres and which roads or roadways were linking several factory building which were located in the premises, such roads or roadways should be regarded as a thing appurtenant to or an adjunct of factory buildings and the cost incurred for laying out such roads or roadways should be regarded as part of buildings and depreciation should be allowed thereon.

6. Having given our anxious consideration to the rival contentions that have been put forward before us in this case, we are of the view that the roads or roadways that have been laid out by the assessee-company for the purposes of linking several factory buildings within the factory premises and which have been used for the purpose of carrying raw materials and finished products and workers, must be regarded as building or buildings within the meaning of sub-clause (vi) of section 10(2) of the Act. It was not disputed that over the land which formed the base, materials such as stones, gravel, cement and other things were used for the purpose of constructing such roads or roadways within the factory premises and it was also not disputed that

these roads are of concrete and are necessary for the transport of raw materials and finished products. It would be pertinent to mention that the expenditure incurred was in the nature of capital expenditure incurred by the assessee-company since they had laid out these roads for the first time to enable the assessee to carry on its business; moreover, it cannot be disputed, these roads or roadways will have to be regarded as adjuncts of the factory buildings or things appurtenant to the factory buildings since these link the various factory buildings lying within the premises and are used for carrying raw materials or finished products. Like factory buildings these roads or roadways which are appurtenant thereto will also deteriorate by reason of constant use to which they are being put in carrying on the business. Having regard to the context of the particular subject-matter dealt with by the relevant provision of the Act the expression "building" will have to be construed and the expression regarded in that context cannot be equated with only a structure or a super-structure having walls and a roof thereon. It is conceivable that a particular type of factory, say a rice-mill or groundnut oil extraction mill, may need raised platforms for drying paddy or groundnuts which could be constructed of cement as adjuncts to factory building and though such platforms would be having no walls on any their sides nor any roof over them it would not be possible to deny depreciation allowance in respect of the capital expenditure incurred in constructing such platforms. The provision is intended for giving relief in certain types of capital expenditure and it is not possible to give a restricted meaning to the expression "building" occurring in section 10(2)(vi) as being confined to a structure or superstructure having walls and roof over it. Since the roads or roadways in the instant case have been laid out as adjuncts of the buildings lying within the factory area linking them together and are being used for carrying on its business by the assessee, these roads or roadways will have to be regarded as forming part of the factory buildings and the expenditure incurred therefor will have to be regarded as expenditure on buildings and, therefore, depreciation must be allowed.

7. The Supreme Court decision on which Mr. Hajarnavis has relied is, in our view, clearly distinguishable on facts. In that case the depreciation was claimed not merely on the cost of erecting the building on the land but also on the cost of the land over which the construction had been put up and it was in that context that the Supreme court held that the word "building" occurring in the relevant provision of section 10(2) of the Act meant "structure" and did not include the site. If, in the instant case, the cost of the land over which the roads had been laid out was sought to be included in the capital expenditure, the depreciation claimed by the assessee-company would have come within the ratio of the Supreme Court decision. As stated above, over the land which was in existence in the factory premises, roads or roadways were required to be laid out and for laying out such roads or roadways cost was incurred over which depreciation has been claimed. In our view, therefore, the instant case entirely different from the facts that obtained in the Supreme Court case and, therefore, the ruling relied upon by Mr. Hajarnavis is clearly inapplicable.

8. Mr. Hajarnavis then relied upon another decision of the Supreme Court in the case *ofGhanshiam Das v. Debi Prasad ,* where a brick-kiln with no walls and no roof but which was a mere pit dug in the ground with bricks by its side was held to be no building within the meaning of section 9 of the U. P. Zamindari Abolition and Land Reforms Act. Their Lordships relied upon the definition of building given in the Webster's New International Dictionary and observed as follows :

> "From this definition it does not appear that the existence of a roof is always necessary for a structure to be regarded as a building. Residential buildings ordinarily have roofs but there can be a non-residential building for which a roof is not necessary. A large stadium or an open-air swimming pool constructed at a considerable expense would be a building as it is a permanent structure and designed for a useful purpose. The question as to what is a "building" under section 9 of the Act must always be a question of degree - a question depending on the facts and circumstances of each case."

9. The court went on to hold that the brick-kiln which was merely a pit dug in the ground with bricks by its side with no walls and no roof could not be regarded as a building for the purpose of section 9 of the Act. This decision on which Mr. Hajarnavis relied dealt with the expression "building" occurring in section 9 of the U. P. Zamindari and Land Reforms Act, whereas in the instant case we are concerned with that very expression occurring in sub-section (vi) of section 10(2) of the Income-tax Act. A construction which may not amount to a building for purposes of one enactment may be so for purposes of another. Secondly, in that very decision the Supreme Court has clearly pointed out that even the question as to what would amount to a "building" under section 9 of the Act with which the court concerned depended upon the facts and circumstances connected with each construction. In our view, therefore, no general rule could be said to have been laid down by the Supreme Court in that decision but the question will have to be decided having regard to the facts and circumstances of each case especially in view of the particular provision of the Act with which the court is concerned and, as we have said above, having regard to the subject-matter dealt with by the provision of sub-section (vi) of section 10(2), we are clearly of the view that the expression "building" occurring in sub-clause (vi) of that provision will have to be construed widely and not restrict it to a structure or super-structure having walls and a roof; and, in the facts and circumstances of the present case, the roads and roadways laid by the assessee within its factory premises being adjuncts of the factory buildings would be buildings within the meaning of that expression.

10. Mr. Hajarnavis next contended that in rule 8 of the Indian Income-tax Rules, 1922, the specified asset of building has been classified into four categories, such as, (1) first class substantial building of selected materials; (2) second class buildings of less substantial

construction; (3) third class buildings of construction inferior to that of second class buildings but not including purely temporary erections; (4) purely temporary erections such as wooden structures. According to him, this classification clearly implies that the asset must amount to some sort of structure which could be regarded as either a first class structure or second class structure or a temporary erections for which different rates of a depreciation are prescribed and roads or roadways with which we are concerned in the case cannot be classified into any one of the four categories mentioned in rule 8 and according to Mr. Hajarnavis, this also indicates that the roads or roadways for which depreciation allowance is claimed by the assessee-company cannot come within the category of the specified asset or building mentioned in sub-clause (vi) of section 10(2). It is not possible to accept this submission of Mr. Hajarnavis for more than one reason. In the first place, the question whether the roads or roadways for which depreciation allowance has been claimed by the assessee-company amount to building or buildings will have to be decided by reference to the specific provisions of section 10(2) and not by reference to the provision which is contained in the rule which prescribes different rates of depreciation allowance. Moreover, it is not understood as to why roads or roadways cannot be classified into one or the other of the categories indicated in rule 8. There could be first class roads or roadways or there could be second class roads or roadways of less substantial construction and there could be even kacha roads which are laid out for temporary purposes. The contention based on rule 8, therefore, cannot be accepted.

11. Having regard to the above discussion, we are clearly of the view that the Tribunal was right in allowing the depreciation allowance at the rate of 2.5 per cent. on the basis of the roads or roadways which were regarded as of a first class material and the first question, therefore, will have to be answered in the affirmative and in favour of the assessee.

12. On the question as to whether there roads or roadways laid out by the assessee-company in the factory premises constitute plant or not, which is the subject-matter of the second question referred to us, we are clearly of the view that the frame of the second question itself suggests that that question will not arise in view of our answer to the first question, for the second question arises only if the first question is answered in the negative. Since we have answered the first question in the affirmative, there is no necessity to deals with the second question, as it does not survive. The revenue will pay the costs of the reference.