Commissioner Of Income-Tax, Bombay ... vs National Storage Pvt. Ltd., Bombay on 26 April, 1967

Equivalent citations: 1968 AIR 70, 1967 SCR (3) 813

Author: S.M. Sikri

Bench: S.M. Sikri, J.C. Shah, V. Ramaswami

PETITIONER:
COMMISSIONER OF INCOME-TAX, BOMBAY CITY-1, BOMBAY

Vs.

RESPONDENT:
NATIONAL STORAGE PVT. LTD., BOMBAY

DATE OF JUDGMENT:
26/04/1967

BENCH:
SIKRI, S.M.
BENCH:
SIKRI, S.M.
SHAH, J.C.
RAMASWAMI, V.

CITATION:
1968 AIR 70 1967 SCR (3) 813
CITATOR INFO :
R 1972 SC2315 (13)

ACT:
Indian Income-tax Act (11 of 1922), ss. 9 & 10-Assessee's premises hired out-Not an ordinary lease but for purposes of its own business-Assessment under which head.

HEADNOTE:
The assessee-Company was promoted because the Government of India promulgated the Cinematograph Rules, 1948, according to which distributors of films were required to store films in godowns constructed in conformity with the specifications laid down in the Rules. The assesses constructed vaults of special design with special doors and electrical fittings as required and entered into agreements with several distributors who became vault-holders paying certain amounts for the use of the vaults. The key to each vault was

retained by the vault-holder, but the key to the entrance which permitted access to the vaults was kept in the exclusive possession of the assessee. The assessee rendered valuable service to the vault-holders by installing a fire alarm, by opening Railway Booking Offices in the premises and by employing a regular staff, and incurred the necessary expenditure. The vaults were used for the specific purpose of storing films and other activities connected with the examination, cleaning, waxing and rewinding of the films.
On the question whether the assessee was to be assessed to Incometax under s. 9 or s. 10 of the Income-tax Act, 1922,
HELD : The assessee was carrying on business, that is, carrying on an adventure or concern in the nature of trade in the premises, and was therefore liable to be assessed under s. 10 and not under s. 9 of the Act.
The Act does not contemplate assessment of property under s. 9 in respect of the rental income and assessment under s. 10 in respect of the extra income derived from the carrying on of an adventure or concern in the nature of trade if the assessee is in occupation of the premises for the purpose of the business. The scheme of the Act is that the various heads of income, profits and gains enumerated in s. 6 are mutually exclusive, each head being specific to cover the item arising from a particular source, and whether an income falls under one head or another has to be decided according to common notions of practical men. In the present case, the agreements are licences and not leases, the assessee being in occupation of all the premises for purposes of its own concern, namely, the hiring out of specially built vaults and providing services to the vault-holders, who were the licensees. The subject which was hired out was a complex one and the return received by 'the assessee was not income derived from the exercise of property rights, but was derived from carrying on an adventure or concern in the nature of trade. [8l8C; [S20C-F]
The Governors of the Rotunda Hospital, Dublin v. Coman, 7 T.C. (H.L.) 517, applied.

JUDGMENT:

CIVIL APPELLATE JURISDICTION : Civil Appeals Nos. 1048- 1051 of 1966.

Appeals from the judgment and order dated July 2, 3, 1962 of the Bombay High Court in Income-tax Reference No. 45 of 1960.

T. V. Viswanatha Iyer, A. N. Kirpal and R. N. Sachthey, for the appellant (in all the appeals). S. T. Desai, F. N. Kaka, S. K. Dholakia and 0. C. Mathur for the respondent (in all the appeals). The Judgment of the Court was delivered by Sikri, J. These appeals by certificate granted by the Bombay High Court under S. 66A(2) of the Indian Income-tax Act, 1925 -hereinafter referred to as the

Act-are directed against its judgment in Income-tax Reference No. 45 of 1960 by which it answered the first question of law referred to it by the Income-tax Appellate Tribunal in favour of the National Storage Ltd., Bombay, hereinafter referred to as the assessee. The following questions were referred to the High Court by the Appellate Tribunal at the instance of the Commissioner of Income-tax, Bombay City-1, Bombay :

> "1. Whether on the facts and circumstances of the case, the vaults were used for the purposes of the business and income arising therefrom is assessable under Section 10 ?
>
> 2. If the answer to question I is in the negative, whether the income is assessable under Section 9 or Section 12 ?"

The relevant facts and circumstances are as follows :-The assessee was promoted because the Government of India promulgated the Cinematograph Film Rules, 1948, hereinafter referred to as the Film Rules according to which the distributors were required to store films only in godowns constructed strictly in conformity with the specifications laid down in the Film Rules and in a place to be approved by the Chief Inspector of Explosives, Government of India. A place at Mahim was approved and the assessee, after purchasing a plot of land there constructed 13 units thereon, 12 units meant for the Members of the Indian Motion Picture Distributors' Association, who had floated the Company, and one unit for Foreign Film Distributors in Bombay, who were not members of the Association. Each unit was divided into four vaults, having a ground floor for rewinding of films and an upper floor for storage of films. These units were constructed in conformity with the requirements of and the specifications laid down in the Film Rules. The walls and ceilings were of a particular width and automatic fire proof door was installed in one wall which would close immediately on the outbreak of fire in the vault. Other walls had no opening or window and one ventilation was provided in the ceiling. The units were built at a distance of 50 feet from one another. The assessee entered into agreements with the film distributors. There were two types of agreements, one was classified as 'A' Licence and the other as 'B' Licence. The agreements were more or less in identical terms with minor variations here and there. One agreement has been annexed to the statement of the case as annexure 'A' and some of the relevant clauses are as under :

> Clause 2 provides that the licensee shall not use the vault for any other purpose except for storing cinema films and shall use the ground floor (examination room) only for the purpose of examination, repairs, cleaning, waxing and rewinding of the films. According to clause 9, the licensee could not transfer, assign, sublet, underlet or grant any licence in respect of or part with the possession of the vault or any part thereof without the written permission of the assessee. According to clause 12, the assessee was entitled to revoke, determine and put an end to the licence by giving the licensee at any time seventy days previous notice in writing. Further, the licensee was not entitled to terminate the licence for a period of five years except with the consent in writing of the assessee. According to clause 13, the assessee was entitled to terminate the licence by giving two days' notice in writing to the licensee and allocate to the licensee alternative space in another vault of the said property. Clause 16

makes it clear that nothing contained in the agreement shall be construed to create any right other than the revocable permission granted by the assessee in favour of the licensee of the licensed vault nor as conferring any right to quiet enjoyment or other right except so far as the assessee has power to grant the same and the assessee may of its mere motion and absolutely retain possession of the licensed vault with all additions, fittings and fixtures thereto. Apart from these conditions, the key to each vault was retained by the vault-holder, but the key to the entrance which permitted access to the vaults was kept in the exclusive possession of the assessee. It is further stated in the statement of the case that the assessee also rendered other services to the vault-holders. A fire alarm was installed and an annual amount was paid to the municipality towards fire services. The assessee opened in the premises two Railway Booking Offices free, of charge for the con- venience of the members for despatch and receipt of film parcels. A canteen was also run in the premises for the benefit of the vault-holders and a telephone had been provided for them. 'A' licensees paid Rs. 40/- per month while 'B' licensees paid Rs. 140/- per month. The Foreign Film Distributors were originally charged Rs. 300/- per month but later on the charges were reduced to Rs. 100/-.

For the assessment years 1950-51, 1951-52 and 1952-53, assessments were made on the assessee under S. 10 of the Act, but for the assessment years 1953-54 and 1954-55, the Income-tax Officer took the view that the assessee should be assessed under s. 9 and not under s. 1O. His view was confirmed on appeal by the Appellate Assistant Commissioner, who also rejected the assessee's alternative submission that the income if not taxed under S. 10 should be taxed under s.

12. On further appeal to the Tribunal, there was a difference of opinion between the Judicial Member, who was the. President, and the Accountant Member. There being a difference of opinion, the following question was referred to a third Member:-

"Whether on the facts and circumstances of the case, the vaults were used for the purposes of the business and income arising therefrom is assessable under Section 10 or Section 9."

The third Member, agreeing with the President, held that the assessee was carrying on business in these premises and -the business was of similar type as carried on by a bank in letting safe deposit vaults, and income was taxable under S.

10. As already stated, the Appellate Tribunal, at the instance of the Commissioner referred the two questions which we have already set out above. The High Court answered the first question in favour of the assessee. The High Court after reviewing several cases deduced seven propositions. The sixth and seventh propositions were these:

"6. In cases where the income received is not from the bare letting of the tenement or from the letting accompanied by incidental services or facilities, but the subject hired

> out is a complex one and the income obtained is not so much because of the bare letting of the tenement but because of the facilities and services rendered, the operations involved in such letting of the property may be of the nature of business or trading operations and the income derived may be income not from exercise of property rights properly so- called. so as to fall under Section 9 but income from operations of a trading nature falling under Section 10 of the Act.
>
> 7. In cases where the letting is only incidental and subservient to the main business of the assessee, the income derived from the letting will not be the income from property falling under Section 9 and the exception to Section 9 may also come into operation in such cases."

.lmo Then the High Court after examining the facts and circtumstances concluded :

> "The income, which is obtained by the company in the present case, required considerable expenditure to be incurred by the company, which is ordinarily not incurred by a landlord who turns his house property to profitable account and which is also not taken into. account in the deductions permissible under Section 9. In our opinion, therefore, the income which the company obtained from the licence-holders in the present case, could not be regarded as income from property failing under Section 9 of the Indian Income-tax Act. The activity of the company in earning that income was a business activity and the source of the income, which the company obtained from the licence-holders, was not the ownership of the house property but its business."

The Commissioner having obtained certificate of fitness from the High Court, the appeal is now before us.

The learned counsel for the appellant, Mr. T. V. Viswanatha Iyer, has put the following propositions before us :-

> (1) The assessee is the owner of property and has to be, assessed as such under s. 9 of the Act. Any incidental services rendered as owner do not alter the character of the relationship between the assessee and the users of the vaults, and there is no complexity as far as the services are concerned;
>
> (2) In any event, assuming for a moment that certain services are rendered, they are independent of and in addition to, the ownership of the property;
>
> (3) The assessee is not carrying on any trade or business by was of letting or otherwise;
>
> (4) The assessee is not in occupation of these vaults for the purpose of his business, and if any room is occupied by its staff, that occupation is different from the

occupation by the users;

(5) There is no plant or machinery which has been let to, the users and the building has been let as something inseparable from the plant and machinery, if any, which exists; and (6) Even if the assessee is carrying on business insofar as it is an owner it has to be taxed under s. 9; additional income has, to be dealt with under S. 10.

Mr. S. T. Desai, the learned counsel for the assessee formulated his proposition as follows :-Distinction has to be drawn between income derived by exercise of property rights properly so called on the one hand, and on the other hand income derived from licensees who are allowed the use of any property, specially constructed safe deposit vaults for securely storing hazardous or inflammable films, or similar goods, or safe deposit lockers for securely keeping valuables and for which purpose special amenities, are given; in the latter class of cases the object is a complex ,one and not merely letting of property and the activities amount to carrying on trade or business, property being the subjectmatter of business. He further says that propositions sixth and seventh as formulated by the High Court are sound.

The answer to the question depends upon the interpretation ,of ss. 9 and 1 0 of the Act, and the ascertainment of 'the activities of the assessee. It is not disputed that the scheme of the, Indian Income-tax Act, 1922, is that the various heads of income, profits and gains enumerated in section 6 are mutually exclusive, each head being specific to cover the item arising from a particular source. Further "whether an income falls under one head or another has to be decided according to the common notions of practical men for the Act does not provide any guidance in the matter". [vide Sarkar J., in Nalinikant Anbalal Mody v. Narayan Row(1)].

The relevant portion of S. 9 reads as follows "9. (1) The tax shall be payable by an assessee under the head 'Income from property' in respect of the bona fide annual value of property consisting of any buildings or lands appurtenant thereto of which he is the owner, other than such portions of such property as he may occupy for the purposes of any business, profession or vocation carried on by him the profits of which are assessable to tax, subject to the following allowances, namely.....

'Section 10(1) reads :

"10. (1) The tax shall be payable by an assessee under the head 'Profits and gains of business, profession or vocation' in respect of the profit or gains of any business, profession or vocation carried on by him. The word "business" is defined in 2(4) to include "any trade. commerce, or manufacture or any adventure or concern in the nature of trade, commerce or manufacture." The question which really arises in the present case is whether the assessee is carrying on any business i.e., is it carrying on any adventure or concern in the nature of trade, commerce or manufacture ? If it is carrying on any adventure or concern in the nature of trade, then S. 9 specifically excludes the income derived 'from property from computation under S. 9, if the property is (1) 61 I.T.R. 428 at p. 432.

occupied for the purpose of adventure or concern. Similar questions have arisen under the English Income-tax Act. Though the scheme of the English Income-tax Act is different, some of the cases throw light on the question as to "what is adventure or concern in the nature of trade." In the Governors of the Rotunda Hospital, Dublin v. Coman(1), the Governors of a maternity hospital established for charitable purposes were owners of a building- which comprised rooms adapted for public entertainments, and which was connected with the hospital buildings proper by an internal passage. The hospital derived a substantial income from letting the rooms for public entertainments, concerts, etc., for periods varying from one night to six months and applied the income to the general maintenance of the hospital. The rooms were let upon terms which included the provision of seating heating-, and attendance, but an additional charge was made for gas and electricity consumed. The House of Lords held that the profits derived from the letting of the rooms were assessable to Income Tax under Schedule D, either under Case 1, as the profits of a trade or business, or under Case VI of that Schedule. The learned counsel for the assessee strongly relies on this case. It seems to us that the reasoning of the Law Lords in their speeches does assist the assessee. The Lord Chancellor observed ,it p. 582 "Profits are undoubtedly received in the present case which are applied to charitable purposes, but they are profits derived not merely from the letting of the tenement but from its being let properly equipped for entertainments, with seats, lighting, heating and attendance. The subject which is hired out is a complex one. The mere tenement as it stands, without furniture, etc., would be almost useless for entertainments. The business of the Governors in respect of those entertainments is to have the hall properly fitted and prepared for being hired out for such uses. The profits fall under Schedule D, and to such profits the allowance in question has no application, as they cannot be properly described as rents or profits of lands, tenements, hereditaments or heritages. They are the proceeds of a concern in the nature of a trade which is carried on by the Governors, and consists in finding tenants and having the rooms so equipped as to be suitable for letting."

In our view the High Court was right in holding that the assessee was carying on an adventure or concern in the nature of trade, The assessee not only constructed vaults of special design and special doors and electric fittings, but it also rendered

1) 17 T.C. 517.

other services to the vault-holders. It installed fire alarm and was incurring expenditure for the maintenance of fire alarm by paying charges to the Municipality. Two Railway Booking Offices were opened in the premises for the despatch and receipt of film parcels. This, it appears to us, is a valuable service. It .also maintained a regular staff consisting of a Secretary, a peon. a watchman and a sweeper, and apart from that it paid for the ,entire staff of the Indian Motion Picture Distributors' Association an amount of Rs. 800/- per month for services rendered to tile licensees. These vaults could only be used for the specific purpose ,of storing of films and other activities connected with the examination, repairs, cleaning, waxing and rewinding of the films.

But the learned counsel for the Commissioner says that s. 9 ,applies because the assessee cannot be said to be in occupation ,of the premises for the purpose of any concern of its own. He says that the licensees were in possession of the vaults as lessees and not merely as licensees. But, in our opinion,

the agreements are licences and not leases. The assessee kept the key of the entrance which permitted access to the vaults in its own exclusive possession. The assessee was thus in occupation of all the premises for the purpose of its own concern, the concern being the hiring out of specially built vaults and providing special services to the licensees. As observed by the Lord Chancellor in the Governors of the Rotunda Hospital, Dublin v. Coman(1), "'tile subject which is hired out is a complex one" and the return received 'by the assessee is not the income derived from the exercise ,of property rights only but is derived from carrying on adventure or concern in the nature of trade.

There is no force in the sixth submission of the learned counsel for the appellant because the Indian Income-tax Act does not contemplate assessment of property under S. 9 in respect of the rental income and assessment under s. 10 in respect of the extra income derived from the carrying on of an adventure or concern in the nature of trade if the assessee is in occupation of the premises for the purposes of the business. The scheme of the En lish Act is different and special statutory provisions exist in the English Income-tax Act (see Rule 5, Schedule D, English Income tax Act, 1918).

A number of other cases have been cited before us but it is not necessary to deal with them because the answer to the question whether an activity is an adventure or concern in the nature of trade or business must depend upon the facts of each case.

Accordingly the appeals fail and are dismissed with costs.

V.P.S. Appeals dismissed.

(1) 7 T.C. 517.