Mahalaxmi Mills Ltd. And Another vs Commissioner Of Income-Tax, Bombay ... on 23 October, 1963

Equivalent citations: [1963]50ITR741(SC), AIR 1967 SUPREME COURT 266

JUDGMENT

DAS GUPTA J. - The assessee is the appellant in each of these four appeals arising out of four reference under section 66(1) of the Indian Income-tax Act to the High Court of Bombay. In two of these (C. As. Nos. 599 and 602 of 1962) the assessee who has filed the appeals is the Mahalaxmi Mills Ltd.; in the other two (C. As. Nos. 601 and 502 of 1962) the Master Silk Mills Ltd. is the appellant-assessee. Appeals Nos. 599 and 601 are in respect of the assessment year 1949-50; the other two are in respect of the assessment year 1951-52. The controversy in all these cases is as regards the computation of written down value in calculating depreciation allowance.

Both the assessee had from before 1949-50 been carrying on business in Bhavnagar which was formerly an Indian State. In 1948 Bhavnagar along with other Indian States of Kathiawar formed themselves into a union by the name of the United States of Kathiawar. Later the name Kathiawar was changed to Saurashtra. On March 16, 1949, the Raj Pramukh of this newly formed State instituted the Saurashtra Income-tax Ordinance, 1949. This Ordinance was in force for one year only - the assessment year 1949-50. In assessing the profits of business by the two appellant companies for the year 1949-50 the Income-tax Officer had therefore to proceed in accordance with the provisions of this Ordinance. For the purpose of calculating the depreciation allowance to which the assessee was entitled, in computing the profits or gains of the business the written down value of the building, machinery and plant or furniture had first to be ascertained in accordance with section 13(5) of the Ordinance, which ran thus :

> "Written down value means :
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> (a) in the case of assets acquired in the previous year, the actual cost to the assessee;
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> (b) in the case of assets acquired before the previous year, the actual cost to the assessee less all depreciation actually allowed to him under this Ordinance or allowed under any Act repealed hereby or which would have been allowed to him if the Indian Income-tax Act, 1922, was in force in the past."

As the assets - of both the assessees - had been acquired before the previous year section 13(5)(b) applied. Reading the words in the last part of section 13(5)(b) as equivalent to "which would have been allowable to him if the Indian Income-tax Act, 1922, was in force" the Income-tax Officer, in ascertaining the written down value, deducted depreciation which would have been allowable under the Indian Income-tax Act, 1922, if it had been in force and a claim had been made supported by prescribed particulars. This amount in the case of the Mahalaxmi Mills Ltd., the appellant in C. A. No. 599 of 1962, was computed as Rs. 17,21,041 and in the case of the Master Silk Mills Ltd., the

appellant C. A. No. 601 of 1962, was calculated as Rs. 2,02,500. The obvious result of deducting this amount was that the written down value became considerably lower than what it would have been otherwise and so the depreciation allowance became less. The assessees contention that no deduction should have been made on the strength of the words "which would have been allowed to him if the Indian Income-tax Act, 1922, was in fact in force in the past" as in fact no claim was made or could be made for such allowance, was rejected by the Income-tax Officer. The Appellant Assistant Commissioner as also the Income-tax Tribunal, however, took a different view and held that this expression "or which would have been allowed to him if the Indian Income-tax Act, 1922, was in force in the past" did not permit the Income-tax Officer to make any deduction under this head. The question of law which was referred to the High Court under section 66(1) of the Indian Income-tax Act on the application of the Commissioner of Income-tax has therefore been framed thus :

> "Whether on the above facts and circumstances of the case and upon a proper construction of the expression or which would have been allowed to him if the Indian Income-tax Act, 1922, was in force in the past in section 13(5)(b) of the Saurashtra Income-tax Ordinance, 1949, the written down value has to be computed by deduction from the actual cost of depreciation allowance which was allowable under the Indian Income-tax Act, 1922, even though not claimed ?"

In each of the cases, the High Court answered the question in the affirmative, but gave a certificate that it was a fit case for appeal to the Supreme Court under section 66A(2) of the Indian Income-tax Act. The present appeals have been filed on the basis of these certificates.

On behalf of the appellants Mr. Kolah has argued that the Ordinance has not used the words "would have been allowable to him" nor the words "would have been allowed to him if a claim supported by prescribed particulars had been made", and there is no justification for reading these where the Indian Income-tax Act is in force the assessee might find it to his interest not to make a claim for the depreciation allowance and so no depreciation allowance would then be allowed to him. He concedes that it may be that the intention of the Raj Pramukh in using these words in the Ordinance was that the depreciation which could have been and would have been allowed if a proper claim had been made and substantiated, assuming the Indian Income-tax Act, 1922, was in force in the past, should be deducted in ascertaining the written down value. He contends however that the words actually used are not sufficient to express and give effect to this intention. According to him, it was necessary in order to give effect to such an intention that the words "if a claim had been made supported by proper particulars" or at least the words "if a claim had been made" had been used in this clause. In our opinion, the words which according to Mr. Kolah were necessary to give effect to the above intention are implicit in the very language that has been used though they have not been expressly used. The authority which made the Ordinance should be credited with having appreciated the position that no depreciation would have been allowed even if the Indian Income-tax Act, 1922, had been in force, if no claim supported by proper particulars had been made. When therefore the words "which would have been allowed to him" were used they were used to mean "which should have been allowed if proper claim had been made." For, it would be meaningless to speak of a depreciation allowance being allowed without a claim. The words used, in our opinion, are apt and

sufficient to express the intention that if the Income-tax Act, 1922, which was not in force in the State before, had been in force, the depreciation that would have been allowed if proper claim had been made should be deducted in ascertaining the written down value.

Mr. Kolah complains that on this construction the position of the assessee becomes worse than if the Indian Income-tax Act, 1922, had actually been in force in Saurashtra. If that had been the case only the depreciation actually allowed in the earlier years would have been deductible and so, if no claim had been made and therefore no depreciation had been actually allowed, nothing would be deductible under this head. It does not stand to reason, argues Mr. Kolah, that the position of the assessee should be made worse by this fiction in section 13(5) (b) of the Ordinance than it would have been if the Act had in fact been in force. It is not unreasonable to think however that when making this Ordinance the Raj Pramukh thought that if the Indian Income-tax Act, 1922, had been in force a proper claim would ordinarily have been made and whatever was allowable under that law would have been allowed as depreciation. The words used not only leave no doubt as regards the intention of the authority, but, as we have already stated, are apt and sufficient to give effect to that intention.

Mr. Kolah urged that it would cause undue hardship to the assessee, that without having actually availed of any depreciation he would be treated as if he had done so. The words used do not however leave any doubt about the meaning and whether or not any hardship has been caused is beside the point.

Neither of the two cases cited by Mr. Kolah in support of his argument is of any assistance. In Commissioner of Income-tax v. Kamala Mills Ltd., the Calcutta High Court decided that the words "actually allowed" in section 10(5)(b) of the Indian Income-tax Act as amended by the Income-tax (Amendment) Act (XXIII of 1941) are unambiguous and connote the idea that the allowance was in fact given effect to. The court rejected a contention of the income-tax authorities that the expression "actually allowed" means "allowable" under the law in force. In that case the court had not to deal with any expression similar to "depreciation which would have been allowed if the Indian Income-tax Act, 1922, was in force". In Rajaratna Naranbhai Mills Ltd. v. Commissioner of Income-tax, the Bombay High Court had to construe the words "the amount of depreciation applicable" and held that as the words were not "depreciation allowed" but "depreciation applicable" it was immaterial whether the assessee got any benefit of depreciation in any previous year. Here also, the court was not called upon to consider the effect of the words under our present consideration, viz., the depreciation which would have been allowed if the Indian Income-tax Act, 1922, had been in force. Thus, neither of these decisions has any application to the present appeals.

For the reasons we have already given, we are of opinion that the High Court was right in answering the question referred in these cases out of which Civil Appeals Nos. 599 and 601 have arisen, in the affirmative.

For the assessment year 1951-52 the controversy arises in a different way. In 1950, Saurashtra became a Part B State of the Union of India; by section 3 of the Indian Finance Act, 1950, the Indian Income-tax Act was extended to it. In 1951-52 therefore the Indian Income-tax Act, 1922, was in

force in Saurashtra in which Bhavnagar was included. So, in calculating the written down value of assets acquired before the previous year the Income-tax Officer had to apply the provisions section 10(5) (b) of the Indian Income-tax Act, 1922, which runs thus :

> "In the case of assets acquired before the previous year the actual cost to the assessee less all depreciation actually allowed to him under this Act, or any Act repealed thereby, or under executive orders issued when the Indian Income-tax Act, 1886 (II of 1886), was in force."

What the Income-tax Officer did was to deduct not only the depreciation allowed in the assessment year 1950-51 under the Indian Income-tax Act but also the depreciation allowed in the assessment year 1949-50 under the Saurashtra Income-tax Ordinance and the depreciation availed of in the previous years by the assessee under the Bhavnagar War Profits Act. There is or can be no dispute that the depreciation allowed in the assessment year 1950-51 was rightly deducted. There might have been a dispute about the depreciation allowed in 1949-50 under the Saurashtra Income-tax Ordinance, but, as before the High Court the assessee conceded that this amount was also rightly deducted and no controversy on this was raised either before the High Court or before us. The only dispute that remains is whether the depreciation availed of under the Bhavnagar War Profits Act - Rs. 5,93,285 in C. A. No. 600 of 1962 by the Mahalaxmi Mills Ltd., and Rs. 1,26,707 in C. A. No. 602 of 1962 by the Master Silk Mills Ltd. - was deductible in law. The Appellate Assistant Commissioner agreed with the Income-tax Officer that this was allowable. The Appellate Tribunal, however, took a different view, but on the prayer of the Commissioner of Income-tax referred the following two questions to the High Court under section 66(1) of the Indian Income-tax Act :

> "1. Whether on the above facts and circumstances of the case and on a correct interpretation of the relevant provisions of section 10(5)(b) read with the Taxation Laws (Part B States) (Removal of Difficulties) Order, 1950, paragraph 2 and the Notification No. 19 (S. R. O. 477) dated 9th March, 1953, under section 60A the written down value is to be computed after deducting depreciation allowance which could have been claimed under the Indian Income-tax Act, 1922 ?
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> 2. Whether the Notification No. 19 (S. R. O. 477) dated 9th March, 1953, is ultra vires of the powers of the Central Government ?"

The High Court has answered the second question in the affirmative and the correctness of that is no longer in dispute before us.

As regards the first question it appears to us that the matter in controversy between the parties which was actually considered by the High Court is not clearly brought out by the question as framed. Both parties agree that the real question on which the High Courts view was sought and which has been actually considered by the High Court may be expressed thus :

> "Whether on the above facts and circumstances of the case and on a correct interpretation of the relevant provisions of section 10(5)(b) of the Indian Income-tax

> Act, 1922, read with the Taxation Laws (Part B States) (Removal of Difficulties) Order, 1950, paragraph 2 and the Notification No. 19 (S. R. O. 477) dated the 9th March, 1953, under section 60A the depreciation availed of by the assessees under the Bhavnagar War Profits Act was a deductible amount in computing the written down value of the assets ?"

It will be noticed that the validity of the notification referred to in the question was the subject-matter of the second question and the correctness of the High Courts answer that it was invalid, was not questioned before us. What really remained to be considered by the High Court was the effect of paragraph 2 of the Taxation Laws (Part B States) (Removal of Difficulties) Order, 1950 - to which we shall later refer as the "Removal of Difficulties Order". The High Court held that the provisions of this paragraph applied to these two cases of assessment for 1951-52 and under them the depreciation already availed of by the assessees under the Bhavnagar War Profits Act had to be deducted in computing the written down value. The correctness of this decision is challenged before us in C. A. Nos. 600 and 602 of 1962.

The Removal of Difficulties Order was made by the Central Government on December 2, 1950, in exercise of the powers conferred by section 12 of the Finance Act, 1950, and section 5 of the Opium and Revenue Laws (Extension of Application) Act, 1950. We are concerned in the present case only with section 12 of the Finance Act, 1950. That section runs thus :

> "If any difficulty arises in giving effect to the provisions of any of the Acts, rules or orders extended by section 3 or section 11 to any State or merged territory, the Central Government may, by order, make such provision, or give such direction, as appears to it to be necessary for removing the difficulty."

Section 3 of the Act had the effect of extending the Indian Income-tax Act, 1922, to Part B States in the Union of India. It was not disputed that it was within the competence of the Central Government to make the Removal of Difficulties Order, 1950, if any difficulty arose in giving effect to the Indian Income-tax Act in an area to which it so became extended. In making the order the Central Government has expressly said : "That certain difficulties had arisen in giving effect to the provisions of the Indian Income-tax Act, 1922. .... in Part B States" and so, the order was made. In Commissioner of Income-tax v. Dewan Bahadur Ram Gopal Mills Ltd. , this court held that it was for the Central Government to determine if any difficulty of the nature indicated in section 12 had arisen and then to make such order or give such direction as appeared to it to be necessary to remove the difficulty. It was in view of this decision that Mr. Kolah conceded that the order was validly made. He contends however that it is only when a difficulty is actually experienced in giving effect to the Indian Income-tax Act that the provision of the Order can come into operation in a particular case. In the cases now under consideration, he argues, no such difficulty was actually experienced and so, paragraph 2 would have no application.

In our opinion, the High Court rightly rejected this contention. The consequence of the Removal of Difficulties Order being validly made under section 12 of the Finance Act, 1950, is that paragraph 2 of the Order (as also the other paragraphs) have to be applied and no exception can be made.

Paragraph 2 runs thus :

> "In making any assessment under the Indian Income-tax Act, 1922, all depreciation actually allowed under any laws or rules of a Part B State relating to income-tax and super-tax, or any law relating to tax on profits of business, shall be taken into account in computing the aggregate depreciation allowance referred to in sub-clause (c) of the proviso to clause (vi) of sub-section (2) and the written down value under clause (b) of sub-section (5) of section 10 of the said Act."

These words require "all depreciation actually allowed under any laws or rules of a Part B State relating to income-tax and super-tax or any law relating to tax on profits of business" to be taken into account in computing the written down value under section 10(5) (b) of the Indian Income-tax Act, irrespective of whether any difficulty has or has not arisen in a particular case in giving effect to the provisions of the Indian Income-tax Act. What is necessary in law is that before an order can be made by the Central Government under section 12, the Central Government must be satisfied that in certain cases difficulties have actually arisen in giving effect to the provisions of the Indian Income-tax Act. Once on such satisfaction an order is made it is not again necessary for the application of the order in a particular case that difficulty must be found to have arisen. A separate order under section 12 has not got to be made for each particular case. The order once made on the satisfaction of the Central Government that in some cases difficulties have arisen in giving effect to the provisions of the Indian Income-tax Act the order operates under its own terms and so in giving effect to the order it is not necessary for the Income-tax Officer to see first whether any difficulty has arisen.

We are of opinion that whether any difficulty did actually arisen in the cases now under consideration in applying the Indian Income-tax Act, 1922, in this Part B State or not, paragraph 2 of the Removal of Difficulties Order must be applied according to its terms. It is therefore not necessary to examine whether any such difficulty did arise in these cases.

This brings us to Mr. Kolahs main contention that the Bhavnagar War Profits Act is not one of the laws, depreciation allowed under which has to be deducted under paragraph 2 of this order. He points out that the Bhavnagar War Profits Act had ceased to be in force long before the Part B State - the United States of Saurashtra - came into existence. It was therefore never a law of a Part B State and so depreciation which the assessee availed of under it will not come within the words "all depreciation actually allowed under any laws or rules of a Part B State relating to income-tax and super-tax." This appears to be correct; but the question still remains whether the Bhavnagar War Profits Act is covered by the word "any law relating to tax on profits of business" in the paragraph. If it does, the depreciation which the assessee availed of under the Act has to be deducted in computing the written down value. Analysing the clause : "all depreciation actually allowed under any laws or rules of a Part B State relating to income-tax and super-tax or any law relating to tax on profits of business", we notice that the words "of a Part B State" were used to qualify the phrase "any laws or rules" in the first portion of the clause. Similar words were not used to qualify the words "any law" in the second part. According to Mr. Kolah these words "of a Part B State" were intended to be read also after the words "any law" in the latter portion and were omitted by way of ellipsis so

that the sentence might not appear cumbersome. Ellipsis is a well-known figure of speech by which words needed to complete the construction or sense are omitted to produce better rhythm or balance in the structure of the sentence.

After careful consideration we have however come to the conclusion that the omission of the words "of a Part B State" in this paragraph is not by way of ellipsis but a deliberate omission with the intention of including laws which could not be stated to be laws of a Part B State but had been laws in the same area at a time before they formed part of a Part B State. If the omission had been by way of ellipsis, as argued by Mr. Kolah, it would be reasonable to think that the words "any law relating to tax" would also have been omitted and this part of the paragraph would have read as "all depreciation actually allowed under any laws or rules of a Part B State relating to income-tax and super-tax or tax on profits of business." It also appears to us that it the intention had not been to include the depreciation allowed under a law which had been law in a component part of the Part B State before it became included in the Part B State, it was unnecessary to add the words "or any law relating to tax on profits of business." For, "a law relating to tax on profits or business" is also a law relating to income-tax and, so, depreciation actually allowed under a law relating to tax on profits of business which was law of a Part B State would come within the first portion of the clause. It is worth noticing in this connection that in 1949 when by an Ordinance certain taxation laws were extended to Merged States the Central Government made under section 8 of that Ordinance "the Taxation Laws (Merged States) (Removal of Difficulties) Order, 1949". Paragraph 2 of that Order merely said "all depreciation actually allowed under any laws or rules of a merged State relating to income-tax and super-tax shall be taken into account." Nothing was said in that Order as regards "any law relating to tax on profits of business." The Removal of Difficulties Order added the words "any law relating to tax on profits of business". This appears to have been done with the deliberate intention of including depreciation allowed under such laws, even though they were not laws "of a Part B State" but of a component State.

We have come to the conclusion that the Bhavnagar War Profits Act is within the words "any law relating to tax on profits of business" in paragraph 2 of the Removal of Difficulties Order. We hold that the High Court has rightly decided that the depreciation availed of by the assessee under the Bhavnagar War Profits Act was a deductible amount in computing the written down value of the assets.

All the appeals are therefore dismissed with costs. There will be one set of hearing fee in all the appeals.