IN THE HIGH COURT OF JUDICATURE AT CALCUTTA

SPECIAL JURISDICTION (INCOME TAX)

ORIGINAL SIDE

RESERVED ON: 08.06.2022
DELIVERED ON: 23.06.2022

CORAM:

THE HON'BLE MR. JUSTICE T.S. SIVAGNANAM

AND

THE HON'BLE MR. JUSTICE HIRANMAY BHATTACHARYYA

ITA/61/2012

COMMISSIONER OF INCOME TAX, KOLKATA-II, KOLKATA

VERSUS

M/S. INTEGRATED COAL MINING LIMITED.

Appearance:-
Ms. Smita Das De, Senior Standing Counsel.
Ms. Sangita Das, Adv.

.....For the Appellant.

Mr. J.P. Khaitan, Sr. Adv.
Ms. Nilanjana Banerjee (Pal), Adv.

.....For the Respondent.

JUDGMENT

(Judgment of the Court was delivered by T.S.SIVAGNANAM, J.)

1. This appeal filed by the revenue under Section 260A of the Income Tax Act, 1961 (the Act for brevity) is directed against the order dated 30.06.2011 passed by the Income Tax Appellate Tribunal, A Bench, Kolkata (Tribunal) in ITA Nos. 788/Kol/2010 for the assessment year 2003-04 and CO No. 60/Kol/2010 in ITA No. 288/Kol/2011 for the assessment year 2003-04. The appeal was admitted on 19th June, 2012 on the following substantial questions of law :

i) Whether on the facts and in the circumstances of the case the learned Tribunal was justified in law in deleting the addition of Rs. 66,00,000/- on account of depreciation on 'Geographical Report' ?

ii) Whether on the facts and in the circumstances of the case the learned Tribunal was justified in law in directing to allow depreciation on Geographical Report as intangible asset and by not considering expense on Geographical Report under Section 35E of the Income Tax Act, 1961?

iii) Whether on the facts and in the circumstances of the case the learned Tribunal was justified in law in deleting the additions on expenses on Road belonging to Zilla Parishad amounting to Rs. 3,57,45,560/- ?

2. Two issues arise for consideration in the case on hand. Firstly, whether the Geographical Report is only a document and not an asset and no deduction is permissible under Section 35E (2) of the Act. This issue will cover substantial

questions of law No. 1 and 2. The second issue is whether the Tribunal was correct in deleting the additions on the expenses incurred by the assessee for development of a road belonging to Zilla Parishad.

3. We have heard Ms. Smita Das De, Learned Senior Standing Counsel for the appellant and Mr. J. P. Khaitan, learned Senior Advocate and Ms. Nilanjana Banerjee Pal, learned Advocate appearing for the respondent.

4. The assessee filed the return of income on 28.11.2003 declaring a total loss of Rs. 16,14,25,030/-, the return was processed under Section 143 (1) on 03.03.2004. The assessee's case was selected for scrutiny and notice under Section 143 (2) was issued on 15.10.2004. The assessee filed a revised return on 30.10.2004 revising the loss to Rs. 16,05,88,710/-. Notice under Section 142 (1) was issued on 17.10.2005 and the case was discussed in the presence of the authorized representative of the assessee. The assessee is involved in mining of coal and for such purpose had purchased a Geographical Report for sum of Rs. 1,65,00,000/- and capitalized it under the head plant and machinery for which depreciation at 25% was claimed. The assessee further claimed depreciation at 15% on the said report under Clause (a) of the first proviso to Section 32(1) (AA) of the Act being a new industrial undertaking. The Assessing Officer raised various queries on the Geographical Report for which the assessee offered certain explanation. The Tribunal elaborately considered the Geographical Report. To examine as to whether deduction can be claimed by the assessee on the said amount, the Tribunal noted that the Geographical Report is a fundamental document which was essential to assess the feasibility of the mine,

to evaluate the economics of the mine and contains a mine-plan according to which the mining activity is to be carried on. Therefore, the Tribunal after appreciating the scope of the report held that the activity involves the nature of exploring, locating or providing deposits and it is only after the study of the Geographical Report, the location of deposit can be identified. Further, the Tribunal noted that the report gives the idea of the nature of deposit and whether mining activity can be carried on in the location. Thus, ultimately the Tribunal agreed with the assessee's stand. However with regard to the claim of the additional depreciation at 15%, the Tribunal did not agree with the assessee. However, the assessee is not an appeal as against such finding.

5. With regard to the link-road the Tribunal took note of the fact that he expenses incurred for developing road was wholly and exclusively for the purpose of the business of a company and accordingly held the same to be allowable as a deduction. Accordingly, the appeal filed by the assessee was allowed to the extent indicated. The revenue by way of this appeal seeks to restore the order passed by the Assessing Officer. In order to appreciate the correctness of the stand taken by the Tribunal, we directed the copy of the Geographical Report to be placed before us. The learned Advocate appearing for the respondent assessee filed copy of the paper book which was filed before the Tribunal in which the Geographical Report was appended. On a perusal of the report, we find it is a very elaborate report and contains 7 chapters, the first of which being introduction, the second geology, the third geological structure, fourth coal seams, fifth description and quantity of coal seams, sixth research

and seventh environmental aspects. The report is a highly technical report and we find that the Tribunal had rightly appreciated the scope of the report. Huge expenditure had been incurred by the assessee to acquire the report as the report is the basic document based on which the assessee gets a right to mine apart from assessing, the quantity of mineral that can be exploited from the said mines, the formation of dyke and other technical details. Therefore, we are of the view that the Tribunal had rightly and elaborately considered the scope of the Geographical Report and granted relief to the assessee and we find that there is no perversity in the order passed by the Tribunal for us to interfere. While on this issue it would be beneficial to refer to the decision of the Hon'ble Supreme Court in ***Scientific Engineering House P. Ltd. Versus CIT, A.P.[1],*** wherein the Hon'ble Supreme Court held as follows:

> *The tenor of the agreements clearly shows that the various documents such as drawings, designs, charts, plans, processing data and other literature included in documentation service, the supply whereof was undertaken by the foreign collaborator, more or less formed the tools by using which the business of manufacturing the instruments was to be done by the assessee and for acquiring such technical know-how through these documents, lump sum payment was made. In other words, the payment of Rs. 80,000 under each of the agreements was principally for rendition of "documentation service". It is, therefore, clear that this expenditure was incurred by the assessee as and by way of purchase price of the drawings, designs, charts, plans, processing data and other literature, etc.,*

[1] 1986 Volume 157 ITR

comprised in "documentation service" specified in clause 3. The expenditure, therefore, was undoubtedly of a capital nature as a result whereof a capital asset of technical know-how in the shape of drawings, designs, charts, plans, processing and other literature, etc., was acquired by the assessee.

The next question is whether such a capital asset is a depreciable asset or not? Under Section 32, depreciation allowance is, subject to the provisions of Section 34, permissible only in respect of certain assets specified therein, namely, buildings, machinery, plant and furniture owned by the assessee and used for the purpose of business while Section 43(3) defines "plant" in very wide terms saying "plant includes ships, vehicles, books, scientific apparatus and surgical equipments used for the purposes of the business". The question is whether technical know-how in the shape of drawing, designs, charts, plans, processing data and other literature falls within the definition of "plant".

Counsel for the assessee urged that the expression "plant" should be given a very wide meaning and reference was made to a number of decisions for the purpose of showing how quite a variety of articles, objects or things have been held to be "plant". But it is unnecessary to deal with all those cases and a reference to three or four decisions, in our view, would suffice. The classic definition of "plant" was given by Lindley L.J. in Yarmouth v. France [1887] 19 QBD 647, a case in which it was decided that a cart-house was plant within the meaning of Section 1(1) of the Employers' Liability Act, 1880. The relevant passage occurring at page 658 of the Report runs thus:

> *"There is no definition of plant in the Act: but in its ordinary sense, it includes whatever apparatus is*

> *used by a businessman for carrying on his business,- not his stock-in-trade which he buys or makes for sale; but all goods and chattels, fixed or movables, live or dead, which he keeps for permanent employment in his business."*

In other words, plant would include any article or object fixed or movable, live or dead, used by a businessman for carrying on his business and it is not necessarily confined to an apparatus which is used for mechanical operations or processes or is employed in mechanical or industrial business. In order to qualify as plant, the article must have some degree of durability, as for instance, in Hinton v. Maden & Ireland Ltd. [1960] 39 ITR 357 (HL), knives and lasts having an average life of three years used in manufacturing shoes were held to be plant. In CIT v. Taj Mahal Hotel [1971] 82 ITR 44 (SC), the respondent, which ran a hotel, installed sanitary and pipeline fittings in one of its branches in respect whereof it claimed development rebate and the question was whether the sanitary and pipeline fittings installed fell within the definition of plant given in Section 10(5) of the 1922 Act which was similar to the definition n given in Section 43(3) of the 1961 Act and this Court after approving the definition of plant given by Lindley L.J. in Yarmouth v. France [1887] 19 QBD 647, as expounded in Jarrold v. John Good and Sons Ltd. [1962] 40 TC 681 (CA), held that sanitary and pipeline fittings fell within the definition of plant.

In IRC v. Barclay, Curle & Co. Ltd. [1970] 76 ITR 62 (HL), the House of Lords held that a dry dock, since it fulfilled the function of a plant, must be held to be a plant. Lord Reid considered the part which a dry dock played in the assessee-company's operations and observed (at p. 67) :

> *"It seems to me that every part of this dry dock plays an essential part…… The whole dock is, I think, the means by which, or plant with which, the operation is performed."*

Lord Guest indicated a functional test in these words (p. 75 of 76 ITR):

> *"In order to decide whether a particular subject is an 'apparatus' it seems obvious that an enquiry has to be made as to what operation it performs. The functional test is, therefore, essential at any rate as a preliminary.*

In other words, the test would be: Does the article fulfill the function of a plant in the assessee's trading activity? Is it a tool of his trade with which he carries on his business? If the answer is in the affirmative, it will be a plant.

If the aforesaid test is applied to the drawings, designs, charts, plans, processing data and other literature comprised in the "documentation service" as specified in clause 3 of the agreement, it will be difficult to resist the conclusion that these documents as constituting a book would fall within the definition of "plant". It cannot be disputed that these documents regarded collectively will have to be treated as a "book", for, the dictionary meaning of that word is nothing but a "a number of sheets of paper, parchment, etc., with writing or printing on them, fastened together along one edge, usually between protective covers; literary of scientific work, anthology, etc., distinguished by length and form from a magazine, tract etc. (vide Webster's New World Dictionary). But apart from its physical form, the question is whether these documents satisfy the functional test indicated

above. Obviously, the purpose of rendering such documentation service by supplying these documents to the assessee was to enable it to undertake its trading activity of manufacturing theodolites and microscopes and there can be no doubt that these documents had a vital function to perform in the manufacture of these instruments: in fact it is with the aid of these complete and up-to-date sets of documents that the assessee was able to commence its manufacturing activity and these documents really formed the basis of the business of manufacturing the instruments in question. True, by themselves, these documents did not perform any mechanical operations or processes but that cannot militate against their being a plant since they were in a sense the basic tools of the assessee's trade having a fairly enduring utility, though owing to technological advances, they might or would in course of time become obsolete. We are, therefore, clearly of the view that the capital asset acquired by the assessee, namely, the technical know-how in the shape of drawings, designs, charts, plans, processing data and other literature falls within the definition of "plant" and is, therefore, a depreciable asset.

Counsel invited our attention to the decision in CIT v. Elecon Engineering Co. Ltd. [1974] 96 ITR 672 (Guj), where the Gujarat High Court has, after exhaustively reviewing the case law on the topic, held that drawings and patters which constitute know-how and are fundamental to the assessee's manufacturing business are "plant". We agree and approve the said view.

6. The decision in the ***Elecon Engineering Co. Ltd.,*** referred in the above decision, has been affirmed by the Hon'ble Supreme Court in the decision reported in ***166 ITR Page 66 (SC).*** The above decision would clearly apply and support the case of the assessee.

The second issue is with regard to the road which was developed by the assessee. The Assessing Officer held that the road which has been formed belongs to the Zilla Parishad and it is only a coincidence that the assessee will use the road for transportation and as the road belongs to the Government, the expenditure cannot be allowed as business expenditure. The Commissioner of Income Tax (Appeals) allowed the appeal filed by the assessee on this ground by holding that no asset is acquired by the assessee nor was there any addition to or expansion of the profit making apparatus of the assessee. As against the said finding the revenue filed cross-objection before the Tribunal. The Tribunal considered the facts and agreed with the CIT (A). Questioning the correctness the revenue is before us.

7. It cannot be disputed by the revenue that by upgrading/ constructing the link-road from the mine to the railway station, the assessee stands benefitted as the transportation of coal which has been mined, can be transported more efficiently and profitably. Further, the road is a public road and the assessee is not the owner of the road and the road was upgraded/ constructed not exclusively by the assessee but the assessee had made contribution for doing the upgradation/ construction work and the remaining contribution was made by the Zilla Parishad. Therefore, the tribunal agreed with the assessee and dismissed the cross-objection filed by the revenue. The decision of the Hon'ble Supreme Court in ***Sugar Factory & Oil Mills (P.) Ltd. Versus CIT, U.P.***[2] will clearly support the case of the assessee. In the said case, the Court found that

[2] 1980 125 ITR 293

the roads under the scheme were undoubtedly advantageous to the business of the said assessee as they facilitated the transport of sugarcane to the factory and the outflow of manufactured sugar from the factory to the market centres, and therefore, it facilitated the business operations of the said assessee and enabled the management to conduct the assessee's business in a more efficient and profitable manner. The operative portion of the decision read as follows:

> *But the position is different when we come to the second item of expenditure of Rs. 50,000. There the assessee is clearly on firmer ground. The amount of Rs. 50,000 was contributed by the assessee under the Sugarcane Development Scheme towards meeting of the cost of construction of roads in the area around the factory. Now, there can be no doubt that the construction of roads in the area around the factory was considerably advantageous to the business of the assessee, because it facilitated the running of its motor vehicles for transportation of sugarcane so necessary for its manufacturing activity. It is not as if the amount of Rs. 50,000 was contributed by the assessee generally for the purpose of construction of roads in the State of Uttar Pradesh, but it was for the purpose of construction of roads in the area around the factory that the contribution was made and it cannot be disputed that if the roads are constructed around the factory area, they would facilitate the transport of sugarcane to the factory and the flow of manufactured sugar out of the factory. The construction of the roads was, therefore, clearly and indubitably connected with the business activity of the assessee and it is difficult to resist the conclusion that the amount of Rs. 50,000 contributed by the assessee towards meeting the cost of construction of the roads under the*

Sugarcane Development Scheme was laid out wholly and exclusively for the propose of the business of the assessee. This conclusion was indeed not seriously disputed on behalf of the revenue but the principal contention urged on its behalf was that the expenditure of the amount of Rs. 50,000 incurred by the assessee was in the nature of capital expenditure, since it was incurred for the purpose of bringing into existence an advantage for the enduring benefit of the assessee's business. The argument of the revenue was that the newly constructed roads, though not belonging to the assessee, brought to the assessee an enduring advantage for the benefit of its business and the expenditure incurred by it was, therefore, in the nature of capital expenditure. The revenue relied on the celebrated test laid down by Lord Cave I.C. in British Insulated and Helsby Cables Ltd. v. Atherton [1925] 10 TC 155 (HL) at p. 192, where the learned law Lord stated:

> *"When an expenditure is made, not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade,..... there is very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating such an expenditure as properly attributable not to revenue but to capital."*

This test enunciated by Lord Cave L.C. is undoubtedly a well-known test for distinguishing between capital and revenue expenditure, but it must be remembered that this test is not of universal application and, as the parenthetical clause shows, it must yield where there are special circumstances leading to a contrary conclusion. The non-universality of this test was emphasized by Lord Radcliffe in Commissioner of Taxes v.

Nchanga Consolidated Copper Mines Ltd. [1965] 58 ITR 241 (PC), where the learned Law Lord said in his highly felicitous language that it would be misleading to suppose that in all cases securing a benefit for the business would be, prima facie, capital expenditure, "so long as the benefit is not so transitory as to have no endurance at all".

No it is clear on the facts of the present case that by spending the amount of Rs. 50,000, the assessee did not acquire any asset of an enduring nature. The roads which were constructed around the factory with the help of the amount of Rs. 50,000 contributed by the assessee belonged to the Government of Uttar Pradesh and not to the assessee. Moreover, it was only a part of the cost of construction of these roads that was contributed by the assessee, since under the sugarcane development scheme, one-third of the cost of construction was to be borne by the Central Government, one-third by the State Government and only the remaining one-third was to be divided between the sugarcane factories and sugarcane growers. These roads were undoubtedly advantageous to the business of the assessee as they facilitated the transport of sugarcane to the factory and the outflow of manufactured sugar from the factory to the market centres. There can be no doubt that the construction of these roads facilitated the business operations of the assessee and enabled the management and conduct of the assessee's business to be carried on more efficiently and profitably. It is no doubt true that the advantage secured for the business of the assessee was of a long duration inasmuch as it would last so long as the roads continued to be in motorable condition, but it was not an advantage in the capital filed, because no tangible or intangible asset was acquired by the assessee nor was there

any addition to or expansion of the profit-making apparatus of the assessee. The amount of Rs. 50,000 was contributed by the assessee for the purpose of facilitating the conduct of the business of the assessee and making it more efficient and profitable and it was clearly an expenditure on revenue account.

8. Thus, for all the above reasons, we find that the order passed by the Tribunal was just and proper. In the result, the appeal filed by the revenue is dismissed and the substantial questions of law are answered against the revenue.

(T.S. SIVAGNANAM, J.)

I agree

(HIRANMAY BHATTACHARYYA, J.)

(P.A.-PRAMITA)