CIVIL REFERENCE

Before Bhandari C.J. and Falshaw J.

THE COMMISSIONER OF INCOME-TAX,—*Petitioner*

versus

S. B. RANJIT SINGH,—*Respondent*

1954

Dec., 9th

Civil Reference No. 4 of 1953

Indian Income-tax Act (XI of 1922)—Sections 11(4) and 10(2)(v)—Applicability of, to hotel premises let out complete with furniture and fittings—Roadways and spaces for the parking of cars—Whether part of the business premises—Expenditure incurred on resurfacing the approach roads to the hotel—Whether covered by the tern "current repairs" or is in the nature of capital expenditure—Section 66—Point not raised before the Income-tax Appellate Tribunal—Whether can be allowed to be raised in he High Court.

The assessee had leased out his premises known as Imperial Hotel, New Delhi, complete with furniture, crockery and fittings for a period of 20 years with effect from 1939. In the year of account (1945-46), the asessee claimed the sum of Rs. 24,904, on account of costs of resurfacing the approach roads as expenditure on current repairs. The Income-tax Appellate Tribunal allowed it as such. At the instance of the Commissioner of Income-tax the Tribunal referred the following question of law to the High Court: —

> "Whether in the circumstances of the case the cost of relaying the cement approach road to the Imperial Hotel, New Delhi, in the year of account 1945-46, was incurred in respect of current repairs to the Hotel premises and is allowable as a deduction under section 12(4), read with section 10(2)(v) of the Indian Income-tax Act".

Held, that on the facts of this case the resurfacing of the whole of the roadways of the hotel had become necessary on account of several years' wear and tear and neglect and so the cost of relaying the cement approach road to the Hotel in the year of account 1945-46, was incurred in respect of "Current repairs" to the hotel premises and is allowable as a deduction under section 12(4) read with section 10(2)(v) of the Indian Income-tax Act.

Held, that a sum can be allowed as the cost of repairs and can be held not to be a capital expenditure in spite of the fact that the expenditure in a particular year happens to be particularly heavy on account of the fact that it is

undertaken to remedy the effect of several years of wear and tear or neglect, and also in spite of the fact that such expenditure may not be necessary for some time to come after the repairs have been effected.

Held, that section 12(4) is applicable to income from a lease of business premises complete with furniture and fittings and the assessee is entitled to the benefit of the relevant provisions of section 10 of the Income-tax Act. It is wrong to say, in the circumstances, that the assessee is running the Imperial Hotel as business, or that his leasing the premises is a business activity.

Held, that in the case of a business of the nature of a hotel and restaurant business, roadways and spaces for the parking of cars are an essential part of the premises.

Held, that the High Court will not allow a new point to be raised before it which was not raised before the Appellate Tribunal and which is not covered by the question framed by the Tribunal and referred to the High Court for decision.

Ratan Singh v. *The Commissioner of income-tax, Madras* (1), *Ramkishan Sunderlal* v. *Commissioner of Income-tax, U.P.* (2), In re *L. H. Sugar Factories and Oil Mills Limited* (3), *Samuel Jones and Co. (Devonvale), Ltd.* v. *Commissioners of Inland Revenue* (4), *Commissioner of Income-tax and Excess Profits Tax, Madras* v. *Siri Rama Sugar Mills, Ltd.* (5), and *Rhodesia Railways, Ltd.* v. *Income-tax Collector, Bechuanaland Protectorate* (6), referred to.

Civil Reference under Section 66(1) of the Indian Income-tax Act XI of 1922 made by the Income-tax Appellate Tribunal (Delhi Bench), for decision of the following question of law by the High Court:—

> *"Whether in the circumstances of the case the cost of relaying the cement approach road to the Imperial Hotel, New Delhi, in the year of account 1945-46, was incurred in respect of current repairs to the Hotel premises and is allowable as a deduction under section 12(4) read with section 10(2)(v) of the Indian Income-tax Act?'*

A. N. KIRPAL and D. K. KAPUR, for Appellant.

K. R. BAJAJ and J. L. BHATIA, for Respondent.

(1) 2 I.T.C. 294
(2) 19 I.T.R. 324
(3) 21 I.T.R. 325
(4) 32 Tax Cases 513
(5) 21 I.T.R. 191
(6) 1 I.T.R. 227

JUDGMENT

Falshaw, J.

FALSHAW, J. This reference has arisen out of the assessment of Sardar Bahadur Ranjit Singh for the assessment year 1946-47, account year ending 31st March, 1946. Besides carrying on business activities and possessing other sources of income the assessee is the owner of the premises in New Delhi known as the Imperial Hotel which he leased out complete with furnishings and fittings to the Company known as the Associated Hotels of India, Limited, in August, 1939 for a period of 20 years at an annual rent of 50,000. In the account year in question the approach roads or drives had fallen into such a bad state that it was found necessary to repair them, and the repairs took the form of resurfacing with concrete the whole of the roadways, totalling more than one furlong in length. This resurfacing cost Rs. 24,904 and in his return the assessee sought to deduct the whole of this amount, under the heading of his income from the Imperial Hotel, on account of repairs. The Income-Tax Officer held that the whole expenditure could not be allowed in one year and that it should be spread over 10 years and allowed a deduction of Rs. 2,472 on this account.

The assessee appealed to the Appellate Assistant Commissioner regarding a number of points in the assessment order including this item, regarding which, in his grounds of appeal, he simply raised the objection that the Income-Tax Officer had erred in spreading the repair charges of Imperial Hotel amounting to Rs 24,904 over 10 years. After considering the matter the Appellate Assistant Commissioner added back even the sum of Rs. 2,472 allowed by the Income-Tax Officer, and held that the whole of the outlay on relaying the roads was a capital expenditure.

This matter was again raised by the assessee in his appeal to the Tribunal, which held that the

case fell within section 12 (4) read with section 10 (2) (v) of the Act and that the expenditure on the roads must be allowed in full. On this the Commissioner of Income-Tax preferred an application under section 66 (1) and the Tribunal has framed the following question for our consideration :—

> "Whether in the circumstances of the case the cost of relaying the cement approach road to the Imperial Hotel of New Delhi in the year of account 1945-46 was incurred in respect of current repairs to the Hotel premises and is allowable as a deduction under section 12 (4) read with section 10 (2) (v) of the Indian Income-Tax Act?"

Section 12 deals with income from other sources, i.e. sources other than salaries dealt with in section 7, interest on securities in section 8, income from property in section 9, profits and gains of business in section 10, and capital gains in section 13. Sub-section (4) of section 12 provides—

> "Where an assessee lets on hire machinery, plant or furniture belonging to him and also buildings, and the letting of the buildings is inseparable from the letting of the said machinery, plant or furniture, he shall be entitled to allowances in accordance with the provisions of clauses (iv), (v), (vi) and (vii) of subsection (2) of section 10 in respect of such buildings."

Sub-section (2) of section 10 deals with allowances to be deducted from profits or gains of business, profession or vocation and clause (iv) reads—

> "in respect of insurance against risk of damage or destruction of buildings, machinery, plant, furniture, stocks or stores, used for the purposes of the business, profession or vocation, the amount of any premium paid ;"

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and clause (v) reads—

> "in respect of current repairs to such buildings, machinery, plant or furniture the amount paid on account thereof."

The finding of the Tribunal in favour of the assessee is based first of all on the applicability of section 12 (4) which was held to cover the case of a lessee of property like the Imperial Hotel, which was in fact constructed as a hotel, and, after being run by the assessee himself for some time, was leased as a going concern with furniture, fittings, crockery, etc., to the present lessee. Having found this item of the assessee's income to fall under section 12 (4), the Tribunal held that the resurfacing of the roadways appurtenant to the hotel buildings amounted to current repairs within the meaning of section 10 (2) (v), since the repairs had become necessary in the ordinary course of the user of the premises and the premises were still in use. The argument put forward on behalf of the income-tax authorities and rejected by the Tribunal was that the resurfacing of the roadways could not be called 'current repairs' on the ground that presumably the roadways would not need any further repairs for some years.

The learned counsel for the Commissioner has argued before us that the case was not covered by sections 12 (4) and 10 (2) (v) at all, since in no sense of the word is an approach road or drive a building. A roadway of any kind certainly does not appear to fall under the definition of 'building' given in any standard dictionary and it was argued that the fact that in these sub-sections the word 'buildings' was strictly to be construed as buildings and nothing else was supported by the fact that section 9 relating to income from property did refer to 'any buildings or lands appurtenant thereto'. It is pointed out that the allowance for repairs in sub-section (1) (i) where the owner is responsible for repairs to property occupied by a tenant is one-sixth of the annual rent

or in other words two months' rent. It is also contended that even if section 12 (4) and section 10 (2) (v) are applicable the resurfacing of the whole of the roadway in the the hotel premises cannot be regarded as 'current repairs'.

On the other hand the learned counsel for the assessee has attempted to put forward a case which does not appear to have been raised before the Tribunal, which presumably decided the matter in his favour on the grounds which were urged before it. This case is that this item of the assessee's income is neither from property under section 9, nor from other sources under section 12 but is ordinary income from business and therefore is covered by section 10 (2) (xv)—

> "Any expenditure (not being in the nature of capital expenditure or personal expenses of the assessee) laid out or expended wholly and exclusively for the purpose of such business, profession or vocation."

This argument is based on the fact that in the assessment order of the Income-Tax Officer the accounts relating to the Imperial Hotel are shown as dealt with under the heading of business and the fact that this was also included in the assessee's excess profits tax assessment for the same year. This is printed at pages 19 and 20 which, however, does not make it at all clear that this particular item had been included. At the same time the fact that the Appellate Tribunal thought it necessary to add at the end of its order that consequential modifications were to be made in the excess profits tax assessment appears to show that this was so, there being two appeals of the assessee before the Tribunal—one under the Income-tax Act and one under the Excess Profits Tax Act.

Since, as I have said above, the matter was presumably decided by the Appellate Tribunal in the assessee's favour on the pleas and arguments advanced on his behalf at the hearing of the appeal, and since the case all along appears to have

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been that the amount should be allowed as the cost of repairs, which must have been under section 12 (4) read with section 10 (2) (v), since obviously he could not claim more than two months' rent for all the repairs done by him to the premises if his claim fell under section 9, it seems to me very doubtful indeed whether the assessee should be allowed at this stage to set up an altogether new case. Indeed I would go further and say that in my opinion even if this item in his income was shown as having been dealt with under the heading of business in the assessment order, this was entirely wrong and the matter should have been dealt with under income from other sources, since I have no doubt whatever that section 12 (4) is applicable to income from a lease of property of this kind i.e. business premises complete with furniture and fittings. It would in my opinion be quite wrong to say that the assessee is running the Imperial Hotel as a business, or that his leasing the premises is a business activity. He has in fact leased it for 20 years, and one of the terms of the lease is that he will not enter into the hotel business himself in Delhi during the term of the lease. I accordingly hold that this item of the assessee's income has been placed in the correct category by the Appellate Tribunal, i.e. it is under section 12 (4) and he is entitled to the benefits of the relevant provisions of section 10.

The next question is therefore whether the roadways which the assessee has resurfaced can be regarded as buildings within the meaning of sections 12 (4) and 10 (2) (v). Here again I cannot help feeling that an entirely new point has been raised by the learned counsel for the Commissioner, since from the order of the Appellate Tribunal it would appear that the only arguments urged before it on this aspect of the case were on the point whether the expenditure on the resurfacing of the roadways was a capital expenditure, as held by the Appellate Assistant Commissioner, or covered by the term 'current repairs' as found by the Tribunal, and there is nothing in the order

to suggest that any argument was advanced on behalf of the income-tax authorities that the expenditure was not incurred on the buildings leased. The use of the words 'hotel premises' in the question framed by the Tribunal confirms that there was no dispute between the parties before it that the roadways were regarded as being attached to or possessing a part of the buildings, and it certainly cannot be denied that in the case of a business of the nature of the hotel and restaurant business roadways and spaces for the parking of cars are an essential part of the premises. In my opinion in order to decide the matter on this part of the argument of the learned counsel for the Commissioner it would be necessary to reframe the question which the Tribunal has referred to us. In the circumstances I do not feel any more inclined to allow an altogether new point to be raised on behalf of the Commissioner, which is not covered by the question framed, than I am to allow the assessee to argue the case on matters which have never been raised before.

I would therefore confine myself to answering the question whether the expenditure incurred on resurfacing the approach roads to the hotel is covered by the term 'current repairs' or is in the nature of a capital expenditure.

The case law on the point does not appear on the whole to be very helpful, since most of the cases decided under section 10 (2) (v) appear to have been concerned with machinery and plant rather than with buildings, and, as is often the case, the general principle deducible from the reported cases is that the decision must depend on the circumstances of each case. This is summed up in the words used by Trotter, C. J., and Beasley, J., in *Ratan Singh* v. *The Commissioner of Income-Tax, Madras*, (1).—

> "The question whether the substitution and renewal of old and worn out parts of a machine is capital expenditure or current repair is one of degree, depending upon the circumstances of each case."

(1) 2 I.T.C. 294

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In *Ramkishan Sunderlal* v. *Commissioner of Income-Tax, U.P.*, (1), Malik C. J., and Bhargava, J., held, in the case of a flour-mill where Rs. 1,554 had been spent on replacing some cables, this being one-third of the total value of all the cables in the mill, that the amount thus spent could not be regarded as current repair and could not be deducted under section 10 (2) (v). The view taken by the learned Judges was that the meaning of 'current repairs' was restricted to petty repairs usually carried out periodically and would not include a repair or renewal costing a large sum of money which had to be spent after the machine had been run for a number of years.

I am not at all sure that I entirely agree with this view if it means that the only test is that a particular item of expenditure must be one which is constantly recurring and not one which may only recur after a few years and it seems to me that other factors must also be taken into consideration.

The same two learned Judges were also responsible for the decision in *re. L. H. Sugar Factories and Oil Mills Limited* (2), in which they held that the expenditure incurred in the re-roofing of labourers' quarters by using new tiles in place of old ones was neither a revenue expenditure nor an expenditure in respect of current repairs, and it was not therefore an allowable deduction. It does not appear to have been disputed that the roofs in question were merely restored to their original condition and again the sole criterion appears to have been that this particular expenditure was not likely to arise again for some time.

On the other hand there is a decision of the Lord President and two Lords of the Court of Session of Scotland *in Samuel Jones & Co. (Devonvale), Ltd.* v. *Commissioner of Inland Revenue* (3), which relates to the case of a paper

(1) 19 I.T.R. 324
(2) 21 I.T.R. 325
(3) 32 Tax Cases 513

factory the chimney of which had fallen into a dangerous condition, with the result that the assessee Company had demolished the chimney and replaced it with a new one. The question was whether the expenditure incurred on this was an admissible deduction spent on account of a repair or whether it was a capital expenditure. It was found as a fact that the new chimney was not an appreciable improvement over the old chimney, and it was held in these circumstances that the whole cost of replacing the chimney, including the cost of removing the old chimney, was an admissible deduction. The ratio decidendi appears to have been that the factory as a whole was a unit and that by the renewal of the chimney the factory was not improved. It must, however, be stated that the question whether this would be covered by the term 'current repairs' was not specifically considered.

The term 'current repairs' was also not under consideration in the case *Commissioner of Income-Tax and Excess Profits Tax, Madras*, v. *Sri Rama Sugar Mills, Ltd.*, (1), in which the replacing of an old boiler by a new one was under consideration, the boiler being one of three used in the factory. This case was under section 10 (2) (xv) and the question was whether the cost of replacing was a capital expenditure or a revenue expenditure, and it was held by one learned Judge that it was a capital expenditure and by the other that it was a revenue expenditure. The former decision prevailed as the decision of the Court as being that of the Senior Judge, there apparently being no rule in the Madras High Court for reference to a third Judge.

The case in which the facts appear to be most analogous with those of the present case is a decision of the Privy Council in *Rhodesia Railways, Ltd.* v. *Income-Tax Collector, Bechuanaland Protectorate* (2). This was the case of a railway on which in the year in question what

(1) 21 I.T.R. 191
(2) 1 I.T.R., 227

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are described as "heavy repairs" had been carried out to the track affecting a mileage of 74 miles out of the total length of 394 miles. On a stretch of 34 miles the whole track had been replaced with new rails and new sleepers, the rails being of the same weight as those originally laid there many years before, while for 40 miles of the track the old rails were relaid but the whole of the sleepers were replaced. It was held by their Lordships that the sum expended was not an expenditure of capital nature and that it was expended for the repairs of the property occupied for the purpose of trade and was rightly deductible from the income assessable to income-tax. The following passage from the judgment delivered by Lord Macmillan is of interest :—

> "The periodical renewal by sections of the rails and sleepers of railway line is in no sense a reconstruction of the whole railway and is an ordinary incident of the railway administration. The fact that the wear although continuous is not, and cannot be, made good annually does not render the work of renewal when it comes to be effected necessarily a capital charge. The expenditure here in question was incurred in consequence of the rails having been worn out in earning the income of previous years on which tax had been paid without deduction in respect of such wear and represented the cost of restoring them to the state in which they could continue to earn income. It did not result in the creation of any new asset ; it was incurred to maintain the appellants' existing line in a state to earn revenue. The analogy of a wasting asset which appears to have affected the minds of the Special Court has really no application to such a case as the present. Nor do their Lordships agree that expenditure in order to form a

permissible deduction must be incurred in the production of the actual year's income which is the subject of the assessment, if by this it is meant that the benefit of the expenditure must not extend beyond the year of assessment, for very many repairs have the result of enabling the income to be earned in future years as well as in the year in which they are effected. In the case of *Ounsworth* v. *Vickers Ltd.* (1), where the expense of dredging a channel and constructing a deep water berth which was undertaken in connection with the launching of a specially large vessel was disallowed as a charge against income. Rowlatt, J., a very experienced authority on all income-tax questions, expressed his agreement with the view that 'assuming that dredging the channel is income expenditure if the respondents dredged year by year, it is none the less income expenditure because the dredging was not done for a year or two because it was not worth while to do so and was only done when it was seriously required to get rid of the mischief which had been growing all the time and which, theoretically, ought to have been kept down coincidently with its growth."

The principle deducible from these decisions is that a sum can be allowed as the cost of repairs and can be held not to be a capital expenditure in spite of the fact that the expenditure in a particular year happens to be particularly heavy on account of the fact that it is undertaken to remedy the effect of several years of wear and tear or neglect, and also in spite of the fact that such expenditure may not be necessary for some time to come after the repairs have been effected.

It seems to me that these principles ought to be applied to the facts of the present case, in

(1) (1915) 3 K.B. at p. 267

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which obviously the resurfacing of the whole of the roadways of the hotel had become necessary on account of several years' wear and tear and neglect, and I am inclined to agree with the view of the Appellate Tribunal that the fact that further repairs may not be necessary for some time to come makes no difference. I would accordingly answer the question framed for our consideration in the affirmative and allow the assessee his costs from the Commissioner. Counsel's fee Rs. 250.

Bhandari, C. J.

BHANDARI, C. J. I agree.