Om Parkash and others
v.
The State

Shamsher Bahadur, J.

that the accused is guilty of the offence before committing him for trial to the Court of Session. The application under section 561-A of the Code of Criminal Procedure is clearly misconceived and has to be dismissed.

In the result, both petitions would stand dismissed. The records should be forwarded to the committing Magistrate forthwith.

R.S.

CIVIL MISCELLANEOUS

Before D. Falshaw, C.J. and S. S. Dulat, J.

M/s. UTTAR BHARAT EXCHANGE LTD.,—*Applicants.*

versus

THE COMMISSIONER OF INCOME-TAX, DELHI,—*Respondent.*

Income Tax Reference No: 1 of 1959:

1963

Nov., 13th.

Income-tax Act (XI of 1922)—S. 66(1)—Assessee taking premises on lease for his business—Lease for two years with option to renew—Assessee constructing structures on the premises in terms of the lease—Amount spent—Whether capital expenditure.

Held, that money spent on structures by an assessee on the leased premises under the terms of the lease is capital expenditure and not a revenue expenditure. The fact that the lease is initially for a short period of two years, though renewable at the option of the assessee and the assessee might enjoy the benefit for a limited period does not alter the nature of the expenditure. The structures form an enduring asset which would be enjoyed by the landlord or some subsequent tenant if the lease was not renewed at the end of the initial period.

Reference under section 66 (1) of the Indian Income-Tax Act, 1922 by the Income-Tax Appellate Tribunal, Bombay,

referring the following question of law for the consideration of Court:—

> *"Whether the expenditure of Rs. 9,804, Rs. 5,199 and Rs. 2,914 in the years 1954-55, 1955-56, and 1956-57 was capital expenditure?"*

K. R. BAJAJ, YASH PAUL MAHNA, J. L. BHATIA, AND PREM NATH MONGA, ADVOCATES, for the Petitioner.

HARDYAL HARDY, AND D. K. KAPUR, ADVOCATES, for the Respondent.

JUDGMENT

Falshaw, C.J.

FALSHAW, C.J.—In this reference under section 66(1) of the Income tax, Act, the question formulated by the Appellate Tribunal for our consideration is:—

> "Whether the expenditure of Rs. 9,804, Rs. 5,199 and Rs. 2,914 in the years 1954-55, 1955-56 and 1956-57 was capital expenditure?"

The assessee in this case is a company Messrs. Uttar Bharat Exchange Ltd., which carries on a commission businees by managing forward business in commodities and also runs a hotel. The dispute relates to the assessment years 1954-55, 1955-56 and 1956-57, the accounting years ending on the 31st of December, 1953, the 31st of December, 1964 and the 31st of December, 1956, respectively.

On the 8th of October, 1952 the assessee company took on lease the first and second floors of the building known as Coronation Hotel, Chandni Chowk, Delhi, for the purpose of carrying on its business. The building vested in the Custodian of Evacuee Property and the first and second floors were at that time in the occupation of a partnership firm styled S. L. Kapur & Co., the partners of which were Maharaj Sahu, Feroze-ud-din and Muslim evacuee named Sultan Ahmad represented by the Custodian. The parties to the lease deed were the three partners of S. L. Kapur & Co. and the assessee. The lease was for a period of two years with an option for renewal and the rent was

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fixed at Rs. 2,500 p.m. for the premises and Rs. 3,500 p.m. for the goodwill of the hotel business then being run in the premises by the partnership concern. It was agreed that the assessee company woud carry on the hotel business, but the following clause (1) in the lease deed was inserted for the purpose of enabling the assessee company to carry on its exchange business in the premises as well as the hotel business:—

"(1) That the lessee shall not at any time during the said term, without the consent in writing of the Custodian, demolish or damage any building or a portion of it to make additions or alterations there, or permit any other person to do so. If he does so he will be responsible to the lessor to idemnify them for the loss so caused besides being liable for cancellation of the lease deed at the option of the landlords or any of them, and if the lease deed is so cancelled, the landlords, or any of them, shall be entitled to resume possession of the premises by force or otherwise in any manner whatsoever. But it is mutually agreed that the lessee may, for the efficient carrying out of the exchange business be permitted to erect (subject to the sanction of the competent authorities and local bodies and subject to any bye-laws or rules in force for the time being) a tin or wooden shade over the open space on the portion reserved for the exchange (but not over the portion reserved for the hotel purpose) as well as wooden partitions inside only the bigger-sized rooms (and not in the smaller rooms) on the side of the building earmarked for the exchange (but not in the rooms in the portion reserved for the hotel. Such shade, partition or

other structures shall be deemed to be an accertion to the building and shall not be liable to be removed by the lessee either on the expiration of the stipulated period of lease or the sooner termination thereof or any other time."

Under this part of the lease agreement the assessee spent in all a sum of Rs. 17,917 on the structures described as gallery, shade and room-partitions, and in the assessee's accounts this sum was spread over the three asessment years, Rs. 9,804 in 1954-55, Rs. 5,199 in 1955-56 and Rs. 2,914 in 1956-57.

In each year the sum so expended was claimed by the assessee to be a revenue expenditure. The argument advanced before the Income-tax Officer in support of this contention was that the lease was only for a period of two years, but this contention was rejected and it was held that the expenditure was a capital expenditure. Before the Appellate Assistant Commissioner a fresh argument was advanced that the expenditure was for repairs, but this was also rejected and the Appellate Tribunal held that the expenses incurred brought into existence the assets of enduring nature and therefore were capital expenditure. This reference has been made at the instance of the assessee.

No attempt has been made to argue before us that the structures on which these expenses were incurred were merely in the nature of repairs, and although the learned counsel for the assessee has disclaimed any admission that these expenses would in any circumstances be a capital rather than a revenue expenditure, his whole argument amounted to an admission that they would at least be legitimately classed as capital expenditure either if the assessee

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had been the owner of the building or even if the lease had been for a long period instead of merely for two years with the option of renewal, but that the nature of the expenditure was changed by the fact that the lease was in the first instance for only a period of two years. It was contended that since under the terms of the lease agreement the structures created as the result of this expenditure were to be treated as accertion to the building and to go to the land lord on the termination of the tenancy no enduring capital asset had been created by the expenditure. It was further argued that in the circumstances the sums thus expended amounted to no more than an addition to the rent and should be treated as such.

However, the learned counsel for the assessee was unable to cite any authority to support these contentions on any set of facts bearing any resemblance to the facts of the present case. The first case he cited was *In Re: Parma Nand Haveli Ram* (1), a decision of a Full Bench of the Lahore High Court. In that case the assessee was a manufacturer of potassium nitrate and sodium chloride and for the purpose of obtaining crude saltpetre, the raw material for his products, he had taken areas of salt bearing lands in different villages in short term leases from which labourers employed by him collected the salt-bearing earth. The Income-Tax Officer had held that the sum spent by the assessee in acquiring the sites for the purpose of extracting crude saltpetre neither represented the price of raw materials nor rent of land, but was a capital expenditure incurred for acquiring the right of removing salt bearing earth and extracting crude saltpetre from it, but the learned Judges held that the sum expended on the leases was not expended in acquiring the assessee's business but for the purpose of running it and it should not therefore be regarded as a capital expenditure. It was, however, observed

(1) (1945) 13 I.T.R. 157.

by Munir J. who delivered the judgment that it might perhaps be different where the land worked was the property of the assessee or was acquired by him on a long term lease because in such a case the rights in the land would be a fixed capital asset.

The next case cited *in Re*: *Benarsidas Jagannath* (2), raised a somewhat similar question which was decided in the same way by a Full Bench of five learned Judges. In that case the assessee, a manufacturer of bricks, obtained on lease lands for the purpose of digging out earth for use in the manufacture of bricks and under the terms of his agreements he had the right to dig earth up to 3' or 3½' deep after which he ceased to have any interest left in the lands, the periods of the leases varying from six months to three years. The Income-Tax authorities held that the money spent on these leases was a capital expenditure, but the learned Judges held that the main object of the agreements was the procuring of earth for manufacturing bricks and not the acquisition of an advantage of a permanent nature or of an enduring character and that the payments made were the price of raw material. It was, therefore, held that the assessee was entitled to claim them as business expenditure, but that sums spent for obtaining leases for a substantially long period varying from ten to twenty years could not be held to be valid deduction if they amounted to an acquisition of an asset of an enduring advantage to the lessee.

It will, however, be seen that the facts in those cases were very different and there can be no possible quarrel with the decision of the learned Judges that the sums spent were for the purpose of obtaining the raw materials necessary for the assessee to carry on his business. The views expressed by them regarding the position if the leases had been longer can only be

(2) (1947) 15 I.T.R. 185.

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regarded as *obiter* and at the same time somewhat tentative.

In the present case there cannot be any doubt whatever that under any ordinary circumstances expenditure of this kind is a capital and not a revenue expenditure, and I do not see how the fact that the assessee might only enjoy the benefit of the structures for a limited period can alter the nature of the expenditure. The structures in fact formed an enduring asset which would be enjoyed by the landlord or some subsequent tenant if the lease was not renewed at the end of the initial priod.

The argument that in the special circumstances of this case the expenditure should be treated merely as an addition to the rent appears to be completely answered by Lord Greene, M. R. in the case *Henriksen (H. M. Inspector of Taxes)* v. *Grafton Hotel Ltd.* (3) In that case in arriving at their income tax assessments, the appellants claimed to deduct instalments of monopoly value paid in respect of licensed premises of which they were the tenants. The lease provided that the appellants should pay all such charges, and they contended that the monopoly value payments were therefore payments made under a contractual liability and in the course of and for the purpose of their trade. The licence had on three occasions been granted for a period of three years and on each occasion monopoly value had been assessed as lump-sum payable by instalments. It was held that the monopoly value, though payable by instalments, was imposed as a lump sum and was of the nature and quality of a capital payment. There can be no difference in principle between a payment out and out for monopoly value and a payment in respect of a term. The sums claimed by the appellants were therefore not deductible. The following passage

(3) (1942) (1) A.E.R.. 678.

occurs in the judgment of Lord Greene M. R. at page 682:—

"One other argument must be mentioned. It was said that whenever the position might be in the case where, e.g., a freeholder obtains a licence and makes the necessary payments, there is a difference where the payments are made by a lessee under a covenant in that behalf contained in his lease. I do not follow this. If a payment is of such a nature as to preclude its deduction when made spontaneously, I cannot see that its nature is affected by reason of the fact that it is made under a covenant with a third party. Capital improvements are often made under a covenant in a lease. I have never heard it suggested that the cost of making them can be deducted by the lessee in computing his profits for income tax purposes. An attempt was made to rescue this argument from shipwreck by saying that, if the lessor had undertaking to bear these payments and had consequently exacted a higher rent the full rent could have been deducted as an expense. This argument has a familiar ring. The answer to it is that this was not the contract which the parties chose to make. It frequently happens in income tax cases that the same result in a business sense can be secured by two different legal transactions, one of which may attract tax and the other not. This is no justification for saying that a taxpayer who has adopted the method which attracts tax is to be treated as though he had chosen the method which does not or *vice versa*."

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The reported cases show difficulties encountered in deciding what is and what is not capital expenditure and these difficulties have been recognised by the legislature in not attempting a definition of the term. In the words of Lord Maonaghten in *Dovey* v. *Corry* (4), cited with approval in the judgment of the Supreme Court in *Assam Bengal Cement Co. Ltd.* v. *Commissioner of Income Tax West Bengal* (5).—

> "I do not think it desirable for any tribunal to do that which Parliament has abstained from doing, that is, to formulate precise rules for the guidance or embarrassment of business and in the conduct of business affairs. There never has been, and I think there never will be, much difficulty in dealing with any particular case on its own facts and circumstances, and, speaking for myself. I rather doubt the wisdom of attempting to do more."

The plain fact in the present case is that there has been a capital expenditure on certain structures made under the terms of the lease, and the fact that the lease was initially for the short period of two years, though renewable at option, cannot change the nature of this capital expenditure into a revenue expenditure. I, therefore, consider that the view taken by the authorities was correct and that the question referred to us for decision must be answered in affirmative. The Commissioner will have his costs from the assessee. Counsel's fee Rs. 250.

November 13, 1963.

Dulat, J.

S. S. DULAT, J.—I agree.

K.S.K.

(4) Appeal Cases 477, (1955) 27 I.T.R. 34.