INCOME-TAX REFERENCE

Before Mehar Singh, C.J., and R.S. Narula, J.

DAL CHAND & SONS,—*Appellant*

versus

THE COMMISSIONER OF INCOME-TAX, PATIALA—*Respondent*

Income Tax Reference No. 47 of 1962

December 13, 1967

Income-tax Act (XI of 1922)—Ss. 10(2) (vii) and 12(3)—Income derived by the assessee from the lease of a factory—Such income—Whether becomes income from businesness and assessable under section 10—Case covered by section 12(3)—Second proviso to S. 10(2)(vii)—Whether applies.

Held, that a business may be done in a number of ways and one of the ways is to run a commercial asset as such and another way may be that the commercial asset, at a particular time, is found to be more responsive to profit if allowed to be run as such by another as lessee. In either case the owner of the factory carries on the business of earning profits and gains from such an asset. So long as a business asset is exploited as such and profits or gains are earned from it, the same are profits and gains of a business, howsoever the owner of the commercial asset exploits the same. So when it is said whether he carried on the business himself or not that only means whether he carried on a business activity which may have led to his earning profits or making gains. Once profits or gains are made from the use of the commercial asset itself, then the further detail whether the owner ran the commercial asset himself or it had been run by another person as a lessee for him makes not the least difference. He makes profits or gains just the same and he makes the same from and in consequence of running of the business asset. Hence income derived by an assessee from the lease of a factory becomes income from business and assessable under section 10 Income-tax Act.

Held, that the second proviso to section 10(2)(vii) of the Act brings to charge escaped profit or gain of a business carried on by an assessee and is not a provision which provides for any allowance to which reference is made in sub-section (3) of section 12 in relation to clause (vii) of sub-section (2) of section 10 of the Act.

If to a case to which sub-section (3) of section 12 applies, the said second proviso would obviously be not attracted, not being a provision making allowance.

Case referred by the Income-tax Appellate Tribunal, Delhi Bench 'C' under sub-section (1) *of section* 61 *of the Income-tax Act,* 1922 (*Act XI of* 1922), *by its order of August* 3, 1962, *for decision of the following questions of law involved in the case.*

"(1) *Whether the income derived by the assessee from the lease of the factory has been rightly treated as income from business assessable under section* 10 ?

(2) *Whether the second proviso to clause* (*vii*) *of sub-section* (2) *of section* 10 *of the Income-tax Act does not apply to the case covered by section* 12(3) ?

C. D. Dewan and V. P. Sharda, Advocates, for the Appellant.

B. S. Gupta and Ramesh Chand, Advocates, for D. N. Awasthy, Advocate, for the Respondent.

Judgment.

Mehar Singh, C.J.—This is a reference by the Income-tax Appellate Tribunal, Delhi Bench 'C', under sub-section (1) of section 61 of the Income-tax Act, 1922 (Act XI of 1922), by its order of August 3, 1962, on these questions to this Court :—

"(1) Whether the income derived by the assessee from the lease of the factory has been rightly treated as income from business assessable under section 10 ?

(2) Whether the second proviso to clause (vii) of sub-section (2) of section 10 of the Income-tax Act does not apply to the case covered by section 12(3) ?

The facts have been found by the Income-tax Appellate Tribunal and obviously are no longer a matter of controversy between the parties. The reference has been made by the Income-tax Appellate Tribunal at the instance of the assessee, Dal Chand and Sons of Ferozepur Cantt.

The assessee is a Hindu undivided family with the name and style of Dal Chand and Sons, Ferozepur Cantt. Dittumal-Narsingh Dass of Fazilka was indebted to the assessee. There was

some litigation between the two about the debt and ultimately the matter was settled in the High Court some time in 1937 when the assessee acquired ginning factory, of which the valuation was set by the High Court at Rs. 39,650, in settlement of the debt from Dittumal-Narsingh Dass of Fazilka. Between the years 1937—39 the assessee made additions in the machinery of the factory, its building and electricity fittings of a total cost of Rs. 70,446, thus bringing the total cost of the factory to Rs. 1,10,096. It obtained depreciation relief for the assessment years 1937-38 to 1952-53, in the amount of Rs. 67,420. The assessee ran the factory as such till 1948, and in that year it leased out the whole of the factory to one Ganesh Dass on an annual lease. The assessee ultimately on June 21, 1951, sold the factory for Rs. 1.50,000 to Bal Chand Sharda of Fazilka.

In the assessment year 1952-53, the Income-tax Officer treated the depreciation amount of Rs. 67.420 as profit of the business of the assessee and brought the same to tax. The assessee claimed that the amount was not profit under section 10(2) of the Act, but was income under section 12 of the same, so that by virtue of sub-section (3) of the section, it has benefit of allowance under section 10(2) (vii), but was not liable to the charge made under the second proviso to that provision. This the Income-tax Officer did not accept and on appeal the Appellate Assistant Commissioner did not accept the same. On a further appeal the Income-tax Appellate Tribunal upheld the orders of the authorities below applying second proviso to section 10(2) (vii) to the case and repelling the contention of the assessee that its case comes under section 12(3) and, therefore, second proviso to section 10(2)(vii) cannot be applied to it, though it is entitled to the benefit of any allowance that may be available to it under section 10(2)(vii), It is on the application of the assessee, as stated, that the Income-tax Appellate Tribunal has made reference to this Court of the two questions as given above.

On the sale of the factory the assessee realised amount in excess of the written down value of the factory. According to second proviso to section 10(2)(vii) the difference between the original cost and the written down value, in such a case, is deemed to be the profits of the previous year in which the sale takes place. So that difference comes to Rs. 67,420, which is in fact the amount of the depreciation in regard to the factory allowed to the assessee in the

assessment years between 1937-38 and 1952-53, both years inclusive. The question thus in substance is whether after the sale of its factory by the assessee on June 21, 1951, this amount of Rs. 67,420 is to be deemed to be part of its taxable income in accordance with second proviso to section 10(2)(vii), the assessee having run the factory up to 1948 and having leased it in that year as a going business, and it remained as a going business to the date of the sale in the hands of the lessee. This has given rise to the first question. The Income-tax Appellate Tribunal is of the opinion that even if the assessee's claim is correct that its case comes under section 12(3), even so second proviso to section 10(2)(vii) applies to it as well, and this opinion has given rise to the second question.

In the *Commissioner of Income-tax, Madras* v. *The Express Newspapers Ltd., Madras* (1), second proviso to section 10(2)(vii) came for consideration of their Lordships in the Supreme Court and their Lordships observed, at page 36,—

> "We are concerned with the second proviso to section 10(2)(vii) of the Act. The substantive clause grants a balancing allowance in respect of the building, machinery or plant which has been sold or discarded or demolished or destroyed. The allowance represents the excess of the written down value over the sale price. Under the proviso, if the sale price exceeds the written down value but does not exceed the original cost price, the difference between the original cost and the written down value shall be deemed to be profits of the year previous to that in which the sale takes place; that is to say, the difference between the price fetched at the sale and the written down value is deemed to be the escaped profits for which the assessee is made liable to tax. As the sale price is higher than the written down value the difference represents the excess depreciation mistakenly granted to the assessee. * * * * *
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> The second proviso, therefore, in substance, brings to charge an escaped profit or gain of the business carried on by

(1) A.I.R. 1965, S.C. 33.

the assessee. The scope of this proviso cannot be ascertained in vacuum. The conditions for its applicability can be ascertained only in its relation to the other related provisions. Under section 3 of the Act income-tax shall be charged for any year in accordance with and subject to the provisions of the Act in respect of the total income of the previous year of every assessee; under section 6, one of the heads of taxable income is profits and gains of business, profession or vocation; under section 10(1), the tax under that head is payable in respect of profits and gains of any business carried on by the assessee during the accounting year. The main condition which attracts all the other sub-sections and clauses of the section is that the tax shall be payable by an assessee in respect of the profit or gains of business, etc., carried on by him. The crucial words are "business carried on by him". If the profitor gains were not earned when the business was being carried on by the assessee during the accounting year, they would fall outside the provision of section 10(1). For instance, if the machinery sold after the business was closed or when the business was under liquidation, it would not be appropriate to hold that the profit or gains earned by the sale were in espect of the business that was being carried on by the assessee. The second condition that attracts the second proviso is implicit in the adjective "such" proceeding "building, machinery or plant" sold. The adjective "such" refers back to clauses (iv), (v), (vi), and (vii) of section 10(2).

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The result is that the second proviso will only apply to the sale of such machinery which was used for the purpose of the business during the accounting year. It brings into charge the escaped profits under the guise of superfluous allowances if the machinery sold was used for the business during the accounting year when the business was being carried on. Therefore, to bring the sale proceeds to charge the following conditions shall be fulfilled;

(1) during the entire previous year or a part of it the business shall have been carried on by the assessee;

(2) the machinery shall have been used in the business; and

(3) the machinery shall have been sold when the business was being carried on and not for the purpose of closing it down or winding it up."

In this case there is no doubt that the machinery was being used in the business up to the date of the sale and that the business of running the ginning factory was being carried on to the date of the sale. At one time the learned counsel for the assessee was endeavouring to say that in the year 1948, the assessee closed its business of ginning factory and, thereafter leased it out, but then he had to admit that there was no evidence in support of any such claim on the part of the assessee. The findings of fact by the Income-tax Appellate Tribunal are clear that the assessee was running the factory till 1948, the year it leased it out, on an annual lease, to Ganesh Dass, and the lease was renewed from year to year till on June 21, 1952, the assessee sold the factory. The learned counsel for the assessee has, therefore, urged the case of the assessee in so far as the first question is concerned only on the first of the three conditions referred to by their Lordships in the case just cited, that is to say, that during the previous (assessment) year the assessee was not carrying on the business of the factory and not even for a part of the year. The reason given for this is that the factory had been leased out to another person and it was he who was running it as business. The assessee did not draw any income or profit from the actual running of the factory, but all that it did was to realise the lease money for the particular year. The learned counsel has stressed that the realisation of the lease money by the assessee was not business carried on by the assessee and the facts and circumstances of this case are within the scope of the first condition laid down by their Lordships in the case just cited and as such he has urged that section 10(2)(vii) is not attracted to this case. In fact he has said that this is not a case in which any profits or gains have been made by the assessee from business, and so he says that sub-section (1) of section 10 is not attracted to the present case. In *Commissioner of Excess Profits, Tax, Bombay City*, v. *Shri Lakshmi Silk Mills, Limited* (2); it was held by their Lordships that it was a part of the normal activities of the assessee's

(2) (1951) 20 I.T.R. 451.

business to earn money by making use of its machinery either by employing it in its own manufacturing concern or temporarily letting it to others for making profit for that business when for the time being it could not itself run it, and that in that case the plant which could not be run because certain raw material was not available did not cease to be a commercial asset of the assessee and the amount representing the rent for the period for which it was leased received from the lessee by the assessee was, therefore, income from business and was chargeable to excess profits tax. At page 455 of the report their Lordships observed that ".....
It installed plant and machinery for the purpose of its business, and it was open to it if at any time it found that any part of its plant for the time being could not be advantageously employed for earning profit by the company itself, to earn profit by leasing it to somebody else. It is difficult to hold that the income thus earned by the commercial asset is not income from the business of the company that has been solely incorporated for the purpose of doing business and earning profits. There is no material whatever for taking a view that the assessee company was incorporated with any other objective than of carrying on business or trade. Owning properties and letting them was not a purpose for which it was formed and that being so, the disputed income cannot be said to fall under any section of the Indian Income-tax Act other than section 10". In that case the business had been temporarily stopped for some months, when the plant was leased out, on account of raw material not being available because of war. The amount of the lease money was thus found by their Lordships to fall under section 10. This case came for consideration before their Lordships again in *Narain Swadeshi Weaving Mills* v. *The Commissioner of Excess Profits Tax* (3), though that was a case in which the business had been found to have been closed and is thus not applicable otherwise, but their Lordships pointed out that even in *Shri Lakshmi Silk Mills Ltd's* case the Court had clearly indicated that no general principle could be laid down which would be applicable to all cases and that each case must be decided on its own circumstances according to the ordinary commonsense principles. It has not been claimed that the business of the assessee has been owning and letting properties. So if it is to be considered as business carried on by it, through the lessee, on payment of annual

(3) A.I.R. 1955 S.C. 176.

lease money, it can only be with reference to the business of the ginning factory itself. The Income-tax Appellate Tribunal in support of its conclusion relied upon the case of *Shri Lakshmi Silk Mills Ltd.*, and it is apparent that it denied the argument urged on behalf of the assessee. The opposite side has relied upon this case and it has been contended on its behalf that it has been consistently held in relation to various kinds of business that letting out of a business or a business asset can itself be a business, as for instance, in *Commissioner of Income-tax, Madras* v. *Mangalagiri Sri Umamaheswara Gin and Rice Factory Ltd.* (4), the business leased was a rice mill, in *In Re. Sadhucharan Roy Chowdhry* (5), the business leased was a jute press, in *Commissioner of Income-tax, Madras* v. *Bosotto Brothers Ltd., Madras* (6), the business leased was a hotel, in *Commissioner of Income-tax, Bombay North* v. *National Mills Co. Ltd.* (7), the business leased was a textile factory, in *Lakshmi Industries (Private) Ltd.* v. *Commissioner of Income-tax, Madras* (8), the business leased was oil and rice mills, in *Sri Ram Mahadeo Prasad* v. *Commissioner of Income-tax, U.P.* (9), the business leased was flour and rice mills, and in *C. P. Pictures Ltd.* v. *Commissioner of Income-tax* (10), the business was the lease of a cinema theatre.

So what is to be seen is whether in the facts and circumstances found by the Income-tax Appellate Tribunal from which conclusion is to be reached, the assessee itself carried on the business or not. The Tribunal has found that the assessee itself was running the ginning factory, after having invested considerable amount in making additions to it, till 1948, when it leased it out as a running business to the lessee on a lease from year to year. This indicated that the assessee continued to remain in a position to take back the factory about the end of the year so as to be able to resume its running itself. The lessee throughout used the factory for its normal purpose of ginning cotton and ran it as business in the same manner as the assessee when giving a lease of it to him. So throughout

(4) A.I.R. 1926 Mad. 1032.
(5) (1935) 3 I.T.R. 114.
(6) (1940) 8 I.T.R. 41.
(7) (1958) 34 I.T.R. 155.
(8) (1961) 41 I.T.R. 645.
(9) (1961) 42 I.T.R. 211.
(10) (1962) 46 I.T.R. 1181.

down to the date of the sale the factory was run and maintained as a going concern and thus as a continuing business asset. The assessee first used that business asset directly to make profit or gain and then it did so as from 1948 through the lessee. The factory having been leased out as a going business asset, its income did not cease to be the income of such an asset. It was not and this has not been the case of the assessee, leased out as a mere property but as a running factory. The duration of the lease being from year to year, as stated, indicates that the assessee retained control with itself to be able to take up the business directly itself at the end of any year. It makes no difference that after a while it decided to and it did succeed in disposing of the factory. A business may be done in a number of ways and one of the ways is to run a commercial asset as such and another way may be that the commercial asset, at a particular time, is found to be more responsive to profit if allowed to be run as such by another as lessee. In either case the owner of the factory carries on the business of earning profits and gains from such an asset. The number of cases already referred to lends support to this approach, and the side of the assessee has not been able to refer to any case which on facts is something like the present case, and takes a view that supports the argument on its behalf.

So long as a business asset is exploited as such and profits or gains are earned from it, the same are profits and gains of a business, howsoever the owner of the commercial asset exploits the same. So when it is said whether he carried on the business himself or not that only means whether he carried on a business activity which may have led to his earning profits or making gains. Once profits or gains are made from the use of the commercial asset itself, then the further detail whether the owner ran the commercial asset himself or it had been run by another person as a lessee for him makes not the least difference. He makes profits or gains just the same and he makes the same from and in consequence of running of the business asset. This, as already stated, is not a case of the assessed having closed and shut off the factory, and then thereafter sold it not as a going commercial asset, but merely as property. In the circumstances, the answer to the first question is in the affirmative.

In view of the answer to the first question, the second question does not really arise, but if it did arise, it seems to appear clear in

view of the decision of their Lordships in the case of *Express Newspapers Ltd.* (1) that the second proviso to section 10(2)(vii) brings to charge escaped profit or gain of a business carried on by an assessee and that second proviso is not a provision which provides for any allowance to which reference is made in sub-section (3) of section 12 in relation to clause (vii) of sub-section (2) of section 10. The matter of allowance is then covered only, for the purpose of this case, by the main body of clause (vii) of sub-section (2) of section 10. So that if this was a case to which sub-section (3) of section 12 applied, then second proviso to clause (vii) of sub-section (2) of section 10 would obviously not have been attracted, not being a provision making allowance. This is a view which finds support from *Commissioner of Income-tax, M.P.* v. *Nandlal Bhandari and Sons (Private) Ltd.* (11), a decision of the Madhya Pradesh High Court. The assessee will bear costs of the Commissioner of Income-tax in this reference. Counsel's fee Rs. 200.

R. S. NARULA, J.—I agree.

R. N. M.

APPELLATE CIVIL

Before Tek Chand, J.

CAPTAIN B. R. SYAL,—*Appellant*

versus

SHMT. RAMA SYAL,—*Respondent*

F.A.O. 6-M of 1967

January 9, 1968

Hindu Marriage Act (XXV of 1955)—Ss. 9 and 13—Decree for restitution of conjugal rights in favour of the husband—Wife not denying right of cohabitation—Resort to proceedings for restitution of conjugal rights by the husband for extraneous reasons—Husband—Whether can claim divorce—Divorce by dissolution of marriage and judicial separation—Difference between—Decree for restitution of conjugal rights—Requisites for obtaining of—Such decree not complied with—Remedies available to the Decree-holder.

(11) (1963) 47 I.T.R. 803.