Bikaner Gypsum Ltd. Vs Commissioner of Income Tax

Court: Rajasthan High Court

Date of Decision: Oct. 29, 1968

Acts Referred: Income Tax Act, 1922 â€" Section 10(1), 10(2), 13

Citation: (1969) 73 ITR 778 : (1969) RLW 274 : (1968) WLN 242

Hon'ble Judges: V.P. Tyagi, J; D.M. Bhandari, J

Bench: Division Bench

Advocate: D. Pal and Dayalsingh, for the Appellant; S.C. Bhandari, for the Respondent

Judgement

D.M. Bhandari, J.
These two references have been made by the Income Tax Appellate Tribunal, Delhi Bench ''B'', u/s 66(1) of the Indian

Income Tax Act, 1922 (hereinafter called the Act). The assessee in these two references is Messrs. Bikaner Gypsum Ltd., Bikaner (hereinafter

called the assessee-company). The facts of these cases as submitted by the Tribunal in their statement of the case are practically the same;

therefore, we propose to decide these references by one single judgment.

2. The facts giving rise to these references, briefly stated, are these:

The assessee-company is a public limited company incorporated on 7th May, 1947, under the company law prevalent in the erstwhile State of

Bikaner. It carries on business of extraction of Gypsum from Jamsar Mines in Bikaner District. The company sold gypsum so extracted to various

persons all over India. The United State of Rajasthan was formed on 7th April, 1949, in which the State of Bikaner was merged. On January 26,

1950, when the Constitution of India came into force, the United State of Rajasthan became a Part B State under the Constitution. The registered

office of the assessee-company is situate at Bikaner. During the accounting year ending 31st March, 1949 (assessment year 1949-50), the

assessee-company sold 24,291 tons of gypsum to various cement companies and local parties, the sale value of which was Rs. 3,01,479-12-0. In

this year, the assessee-company started negotiations with the Government of India for persuading them to use Jamsar gypsum for the Fertilizer

Project, Sindri. In this connection the assessee-company incurred expenses to the extent of Rs. 14,914-10-6. These expenses were not shown by

the assessee-company in its profit and loss account for that year, but this amount was shown in the suspense account. In this very year, a sum of

Rs. 7,000 was also spent for the survey of gypsum deposits. This expense was also not charged to the profit and loss account of that year and was

kept in the suspense account.

3. During the next accounting year ending 31st March, 1950 (assessment year 1950-51), the assessee-company secured contracts for the supply

of gypsum for the said project. This contract was entered into with the Government of India on 11th February, 1950, for supply of 1,00,000 tons

of gypsum. The supply was to commence in March, 1950, and was to be completed not later than 31st October, 1950. The Government of India

also agreed to supply the assessee-company some mining and transport equipment on loan basis, the freight of which had to be borne by the

company. During the said year, the assessee-company incurred the following further expenses on account of securing Sindri contract and in making

supplies in pursuance of that contract:

Rs. 8,945-14-

Travelling to Sindri ...

6

Railway freight on rails and tipping wagons on loan from Rs. 7,753-11-

...

Government of India 0

Loading yard expenses--Earthwork near Jamsar Railway

... Rs. 4,199- 3-9

siding for stocking of gypsum

Rs. 20,898-

Total ...

13-3

4. During the said year, the assessee-company also did extensive overburden removal work in expectation of the Sindri contract and incurred an

expenditure of Rs. 47,386-15-0 out of which Rs. 7,696-15-9 was charged to the profit and loss account of that year and the balance of Rs.

39,690 being the value of unworked portion of the mines was carried forward to the coming years.

5. During the said year the assessee-company sold 35,405 tons of gypsum the sale value of which was Rs. 2,89,664-6-6. This included 5,792

tons of the value of Rs. 31,133-1-0 supplied to the Fertilizer Project, Sindri, in the month of March, 1950.

6. During the next account year ending on 31st March, 1951 (assessment year 1951-52), the assessee-company sold 1,39,995 tons of gypsum,

the sale value of which was Rs. 9,11,599-3-9. Out of this 1,07,497 tons of gypsum of the value of Rs. 6,33,560-13-9 was supplied to the

Fertilizer Project, Sindri. This year the assessee-company claimed a sum of Rs. 91,617 as expenses for procuring and execution of the Sindri

Fertilizer Project contract. Out of this amount Rs. 82,504 were the expenses which had been incurred by it in the earlier two years and which, as

already mentioned, was carried forward by it in the balance-sheet partly in ""suspense account,"" on account of supply to the Sindri Fertilizer Project

and partly as ""overburden removal expenses"". The assessee-company claimed the entire amount of Rs. 91,617 as deduction u/s 10(1) of the Act

or under the general principles of determining the profit and loss of the assessee-company or u/s 10(2)(xv) of the Act. The Tribunal disallowed this

sum as it had not been spent in the accounting year ending on 31st March, 1951 (assessment year 1951-52).

7. These facts relate to question No. (1) in Civil Reference (Income Tax) No. 12/63 which is as follows:

(1) Whether, in the facts and circumstances, the sum of Rs. 82,504 spent by the assessee-company in the earlier years as expense for procuring

and execution of Sindri Fertilizer Project first contract and carried forward by it in its balance-sheet partly as ''suspense (on account of supply to

Sindri Fertilizer Project)'' and partly as ''overburden removal'' is allowable as a deduction under the Indian Income Tax Act u/s 10(1) or under the

general principles of determining the profit or loss of theassessee or Section 10(2)(xv) of the Indian Income Tax Act ?

8. The further facts are that the assessee-company sold gypsum to certain parties in Part A and Part B States during the accounting year ending on

31st March, 1951 (assessment year 1951-52). In paragraph 7 of the statement of the case in Reference No. 12/63, which states the relevant facts

regarding these sales, it is stated that gypsum was sold f. o. r. Jamsar, Bikaner. Contracts for the supply of gypsum to the various parties were

contracts for supply of unascertained goods. Gypsum extracted by the assessee-company was appropriated towards various contracts by the

mines manager at Jamsar. The railway receipts were drawn in the names of the buyers and the goods moved at the buyer''s risk. The railway

receipts, without any lien of the sellers on them, were then sent in the usual course of business to the buyers through post, but in the case of supply

to the Sindri Fertilizer Project, the railway receipts were handed over to their representative posted at Jamsar. The total sales of the year amounted

to Rs. 9,1-1,599 of which sale to parties residing in Part A States was of Rs. 8.73,568 and to parties residing in Part B States was of Rs. 38,031.

Out of this amount, the sum of Rs, 99,272-12-0 was not actually received by the company but was shown as book debts in the books of the

company. For purposes of tax concession under Sub-clause (in) of Clause (1) of paragraph 4 of the Part B States (Taxation Concessions) Order,

1950, hereinafter called the Tax Concessions Order, the Income Tax Officer allocated the profits of the assessee-company between Part A and

Part B States in the proportion of bills drawn on parties of Part A and Part B States. The Income Tax Officer held that the assessee-company''s

sales to the extent of Rs. 8,73,568 were effected to parties in Part A States and accordingly taxed the proportionate profits at the full rate of tax

without giving any concession under the Tax Concessions Order. The assessee preferred an appeal before the Appellate Assistant Commissioner.

The Appellate Assistant Commissioner rejected the appeal. The assessee-company then preferred an appeal to the Tribunal. The Tribunal upheld

the decision of the Appellate Assistant Commissioner on the ground that profits on the sales of Rs. 8,73,568 had accrued to the assessee-

company in Part A State and as such the assessee-company was not entitled to any concession on these profits under the Tax Concessions Order.

The following questions Nos. 2 and 3 have been referred by the Tribunal on these facts :

(1) Whether, in the circumstances of the case, there was any material before the Tribunal on which it could assume and hold that the profit on

sales of Rs. 8,73,568 accrued in Part A State ?

(2) Whether on a correct interpretation of Sub-clause (iii) of Clause (1) of para. 4 of the Part B States (Taxation Concessions) Order, 1950, the

Tribunal was right in holding that the assessee-company was not entitled to concessions on profits of goods sold, the sale price of which was not

received within the relevant previous year and stood as book debt, at Rs. 99,272''75 in the books of the assessee-company ?

9. Reference No. 13/63 relates to the year ending 31st March, 1952 (assessment year 1952-53). During this year, the total sales of the assessee-

company amounted to Rs. 6,75,376, of which the sales to parties in Part A States was of Rs. 6,34,888 and to the residents of Part B States was

of Rs. 40,488. There appears to be some mistake in the figures, but this is not material for the purposes of answering question No. 1 of this

reference which runs as follows :

(1) Whether, in the circumstances of the case, there was any material before the Tribunal on which it could assume and hold that the profit on

sales of Rs. 6,34,888 accrued in Part A State ?

10. The assessee-company had claimed that out of the aforesaid total sale of Rs. 6,75,376 a sum of Rs. 81,686.02 was not received or deemed

to have been received in the taxable territories other than Part B States as the amount stood as book debts in the books of the company. This

claim was rejected by the Tribunal. These facts have given rise to question No. 2 which runs as follows:

(2) Whether on a correct interpretation of Sub-clause (iii) of Clause (1) of Section 4 of the Part B States (Taxation Concessions) Order, 1950,

the Tribunal was right in holding that the assessee-company was not entitled to concessions on the profits of goods sold, the sale price of which

was not received within the relevant previous year and stood as book debt at Rs. 81,686.02 in the books of the assessee-company ?

11. The third question that has been referred by the Tribunal in this reference runs as follows :

(3) Whether, in the facts and circumstances of the case, the Tribunal was right in holding that legal expenses amounting to Rs. 7,453 incurred in

defending the monopoly right enjoyed by the assessee-company under an instrument of assignment of lease was an inadmissible expense u/s 10(2)

(xv) of the Indian Income Tax Act ?

12. The facts stated in the statement of the case with regard to this question are as follows :

In the terms of the indenture of assignment of the mining lease dated 11th December, 1948, granted to the assessee-company, it had the first

option of refusal for the grant of licence for other deposits of gypsum on terms which were to be mutually agreed upon. Without first offering the

new deposit to the assessee-company and without first obtaining the company"s refusal of the offer and without any notice to the company, the

Tehsildar, Suratgarh, put certain areas under auction and obtained a bid of Rs. 5,600 per year. On this followed a litigation between the assessee-

company and the State of Rajasthan. The assessee-company filed a writ petition in the Rajasthan High Court to protect the right it had acquired

under the aforesaid lease deed.

13. The assessee-company claimed a sum of Rs. 7,453 in defending the monopoly right enjoyed by it under the aforesaid instrument of assignment

of lease as an admissible expense u/s 10(2)(xv) of the Act. This claim was rejected by all the Income Tax authorities. The Tribunal has referred

question No. 3 on these facts.

14. Notice of these references were given to the parties and elaborate arguments were addressed by the learned counsel for the parties.

15. We first take up question No. (1) of reference No. 12/63. As mentioned above, the assessee-company has claimed deduction of this amount

in the year ending March 31, 1951 (assessment year 1951-52), though this amount of Rs. 81,504 was not spent by the assessee-company in that

year but was spent in earlier years.

16. Three-fold arguments have been addressed by learned counsel for the assessee-company for claiming this amount as an allowable deduction

under the Act. We proceed to discuss the first argument. It is urged that u/s 13 of the Act, income, profits and gains have to be computed for the

purpose of Sections 10 and 12 of the Act in accordance with the method of accounting regularly employed by the assessee and it is contended that

the method of accounting which has been regularly employed by the assessee-company was that it charged the expenses which had been incurred

by it not in the year in which such expenses were incurred but in the year in which the main part of the contract in which connection the expenses

were incurred was performed. It is contended that this method of accounting gives a much more realistic picture of the profit and loss incurred by

the company in a particular year and that there was nothing wrong in adopting such a method of accounting.

17. Two main systems of accounting are the cash system and the mercantile system. The method of accounting adopted by the assessee-company

in the instant case is neither the cash system nor the mercantile system. It is, however, contended by learned counsel for the assessee-company that

an assessee is entitled to adopt any other hybrid system of accounting of his own and his income, profits and gains are to be computed in

accordance with the method of accounting regularly employed by him though such method of accounting may not be any of the recognised

methods. In this connection he has relied on Gappumal Kanhiyalal v. Commissioner of Income Tax [1961] 42 ITR 416. After referring to a

number of authorities and more particularly to the observations of Lord Russell in Commissioner of Income Tax v. Chitnavis [1932] 2 Comp Cas.

464 their Lordships of the Allahabad High Court observed as follows:

Therefore the general proposition is true that expenses must be claimed as incurred in the relevant accounting year. But the question still remains

as to whether in view of the hybrid system of accounting maintained by this assessee he could claim to deduct expenditure incurred in previous

years in the assessment year in question ..... When we come to Section 13 of the Income Tax Act we find that income, profits and gains have to

be computed for the purposes of Section 10(1) in accordance with the method of accounting regularly employed by the assessee. There is a

proviso to that section which says that if no method of accounting has been regularly employed, or if the method employed is such that in the

opinion of the Income Tax Officer the income, profits and gains cannot properly be deduced therefrom, then the computation shall be made upon

such basis and in such manner as the Income Tax Officer may determine. It seems, therefore, to follow that if profits are to be computed in

accordance with the method of accounting regularly employed by the assessee, then it is to the method of accounting that one must look. And if the

method of accounting regularly employed is a method whereby litigation expenditure is, so to say, kept in a suspense account and is brought into

the accounts only for the purpose of being claimed as expenditure when the fate of the litigation is clear and nothing can be recovered out of the

sum expended then it ought not to matter whether the expenditure which has been kept in the suspense account was actually incurred in earlier

years. If according to the regularly employed method of accounting the expenditure is treated as having been incurred in the accounting year, then it

should matter little whether the expenditure was actually incurred in years earlier. Of course this does not mean that an assessee would be entitled

to the benefits of his accounting system if that were brought into existence for the particular purpose of backing his claim only in the particular year.

But if a method of accounting is regularly employed, then the assessee ought to get the advantage and suffer the disadvantage of that system of

accounting, provided the accounting system is regularly maintained, and even though it may happen that in a particular year the revenue may gain

but in another year the assessee may gain.

18. We have no hesitation in adopting these observations as enunciating the correct law on the point. But this very authority has made it clear that

as a general proposition expenses must be claimed in the relevant accounting year and it is only when the assessee is keeping his accounts in

accordance with any other method which is regularly employed by it that the Income Tax authorities must find out the income, profits and gains of

such assessee on the basis of the system of accounting regularly employed by him. The question therefore is : what was the method of accounting

regularly employed by the assessee-company in this case ? Neither in the statement of the case nor in any of the orders of the Income Tax

authorities do we get any finding to the effect that the assessee-company was regularly employing the method of carrying forward the expenses

incurred by it to the subsequent years and then charging those expenses in the year in which the contract to which the expenses related was mainly

performed. What method of accounting is regularly employed by an assessee is a question of fact and that question is to be determined by the

income tax authorities. There is no finding in favour of the assessee on this point and unless there is such finding on a question of fact in favour of

the assessee, we cannot hold that Section 13 of the Act is attracted so as to hold that the expenses of Rs. 82,504 which had been incurred by the

assessee-company in the earlier years could be validly allowed as deduction under the Act,

19. Learned counsel for the assessee-company has argued that in the order of the Appellate Assistant Commissioner dated 28th January, 1959,

the position of over-burden removal account is given as under.

OVER-BURDEN REMOVAL EXPENSES :

The position of this account is as under :

Assessment year 1950-51

Dr. Rs. Cr. Rs.

Expenses incurred 47,387 Transferred to mining 7,697

during the year expenses

By balance carried over 39,690

47,387 47,387

Assessment year 1951-52

Dr. Rs. Cr. Rs.

Opening balance 39,690 Transferred to mining 66,158

expenses

Expenses incurred 26,468 Nil

during the year

66,158 66,158

Assessment year 1952-53

Dr. Rs. Cr. Rs.

Expenses incurred 44,031 Transferred to mining 12,027

during the year expenses

By balance c/o 32,004

44,031 44,031

Assessment year 1953-54

Dr. Rs. Cr. Rs.

Open debit balance 32,004 Credit amount transferred to 1,51,570

mining expenses

Expenses incurred 1,61,817 By balance c/o to next year 42,251

during the year

1,93,821 1,93,821

20. He has urged that the very nature of this account shows that the assessee-company had adopted the method of crediting part of the

expenditure incurred by it in that very year and carrying forward the balance to be charged as expense in the subsequent years and this method of

accounting prima facie shows that the assessee-company is entitled to get its profits assessed in accordance with this method of accounting. What

Section 13 requires is that the method of accounting which is regularly employed by the assessee must be taken for computing income, profits and

gains. The words ""regularly employed"" show that there is a system in the method of accounting adopted by an assessee and that system is being

observed with a regularity in all cases of similar nature. As we have already observed there is no finding that this system of maintaining over-burden

removal account had been regularly employed by the assessee-company in the previous; years or even in the subsequent years. If this system is

adopted in the solitary case of the contract of the Sindri Fertilizer Project, it cannot be said to be a method of accounting regularly employed. What

we have said is also true about the travelling expenses said to have been incurred by the assessee in connection with the securing of the contract

from the Government of India for supplying gypsum to the Fertilizer Project, Sindri. In this view of the matter, we cannot accept this contention

raised by learned counsel for the assessee-company.

21. The second argument is that the assessee-company for the first time secured a big contract from the Government of India and the case of the

assessee-company in respect of the profits and losses incurred by the company in this contract must be dealt with on the basis as if the company

had undertaken a single venture. The entire expenses of this transaction which might have been incurred in the earlier years could be charged in the

year in which the contract was completed. In this connection, learned counsel for the assessee-company has relied on the following observations in

Gustad Dinshaw Irani Vs. Commissioner of Income Tax, Bombay City,

In the case of a single venture the profits become assessable only when that venture comes to an end and in this case the venture came to an end

in the year of account. It was only then that the profits could be ascertained and the profits subjected to tax.

22. This case is quite distinct on facts from the case before us. The assessee in that case was a partner in several firms doing restaurant business in

Bombay, He applied for a plot of land to the Bombay Municipality and his application was granted. The assessee assigned his right under the grant

for a consideration. It was under these circumstances the court held that the real profits of the assessee could only be arrived at after taking into

consideration the expenditure incurred in the prior year. Even though the expenditure may not strictly fall within the ambit of Section 10, yet for the

purpose of assessing the real profits credit must be given to the assessee in respect of the expenditure incurred in the prior years. In this view of the

matter, the annual ground rent which the assessee paid previous to the year of account was allowed. In the instant case the assessee is carrying on

the business of excavating gypsum and selling it in a regular manner though it may be that he was able to secure a highly profitable contract at a

particular period of time. It cannot, therefore, be said that the assessee-company was entering into a single venture. In our opinion, this contention

of the learned counsel for the assessee-company has also no force.

23. The third argument on behalf of the assessee-company is that u/s 10(1) of the Act, tax is payable by an assessee under the head ""profits and

gains of business"" in respect of profits or gains of any business carried on by him and it is contended that profits and gains cannot be computed

without making allowance for the expenditure incurred in connection with any particular transaction which resulted in the profit. In this connection,

learned counsel for the assessee-company has placed reliance on the following observations of their Lordships of the Supreme Court in Calcutta

Company Ltd. Vs. The Commissioner of Income Tax, West Bengal,

Apart, however, from the question whether Section 10(2)(xv) of the Income Tax Act would apply to the facts of the present case, the case is, in

our opinion, well within the purview of Section 10(1) of the Income Tax Act. The appellant here is being assessed in respect of the profits and

gains of its business and the profits and gains of the business cannot be determined unless and until the expenses or the obligations which have been

incurred are set off against the receipts. The expression "profits and gains" has to be understood in its commercial sense and there can be no

computation of such profits and gains until the expenditure which is necessary for the purpose of earning the receipts is deducted therefrom--

whether the expenditure is actually incurred or the liability in respect thereof has accrued even though it may have to be discharged at some future

date.

24. The appellant in that case bought lands and sold them in plots fit for building purposes undertaking to develop them by laying out roads,

providing a drainage system and installing lights, etc. When the plots were sold, the purchaser paid only a portion of the purchase price and

undertook to pay the balance in instalments. The appellant in his turn undertook to carry out the developments within six months, but time was not

of the essence of the contract. In the relevant accounting year the appellant actually received in cash only a sum of Rs. 29,392 towards sale price

of lands, but in accordance with the mercantile system of accounts adopted by it, it credited in its accounts the sum of Rs. 43,692 representing the

full sale price of lands. At the same time it debited an estimated sum of Rs. 24,809 as expenditure for the developments it had undertaken to carry

out, even though no part of that amount was actually spent. The department disallowed the expenditure. The Supreme Court took the view that the

sum of Rs. 24,809 represented the estimated amount which had to be expended by the assessee in the course of carrying on his business and was

incidental to his business and, having regard to the accepted commercial practice and trading principles, was a deduction which, if there was no

specific provision for it u/s 10(2) of the Income Tax Act, was certainly an allowable deduction. The expenditure (sic) was actually incurred or the

liability in respect thereof had accrued even though it may have to be discharged at some future date is an allowable expenditure. But it must be

noted that the appellant in that case had adopted a well recognised method of accounting, that is, the mercantile method and the receipts appearing

in the books of account included the unpaid balance of the sale price of the plot in question and the amount of liability undertaken by the appellant

on those receipts was shown as an expenditure in the accounting period. It was held that such an expenditure could be deducted in the year under

assessment. This is not the case before us.

25. We do not mean to say that the expenditure incurred by the assessee-company with regard to the travelling expenses of its officers and

servants incurred in connection with the securing of the contract or for what has been described as an over-burden removal expenditure was not an

allowable expenditure. The real question is in which year it was allowable. Learned counsel for the department has pointed out that the main part of

the expenditure of Rs. 14,914 in connection with travelling for securing the contract was incurred in the year ending on 31st March, 1949, and so

also Rs. 7,000 for survey was incurred in that year. In that year, the Act was not in force and the income of the assessee-company was not taxable

under any law, The assessee-company could have shown this expenditure to have been incurred by it in that year and it would have got no

deduction because there was no tax. The assessee-company purposely kept this amount in the suspense account and showed it as an expenditure

in the subsequent two years when the Act had come into force so that its liability to pay tax may be decreased. There appears to be some force in

this argument. But even if we ignore this aspect, the general rule of law is that allowance for expenditure can be made only in the year the expenses

are incurred, the exceptional cases being cases falling u/s 13.

26. In Commissioner of Income Tax v. Basant Rai Takhat Singh [1933] 1 ITR 197 it has been held that under Sub-section (2) of Section 12 of

the Indian Income Tax Act, 1922, the allowance for any expenditure incurred must be an allowance for expenditure incurred in the year in respect

of which the income, profits and gains forming the basis of the assessment arose. There can be no justification for deducting from the profits and

gains something in respect of expenditure, whether it be regarded as capital expenditure or not, which occurred years before. So also in

Commissioner of Income Tax v. S. M. Chitnavis [1932] 2 Comp Cas 464; 59 I.A. 290 it has been held that in assessing the yearly profits and

gains of a business for the purpose of the Act, each year is a self-contained period.

27. A debt which has become a bad debt during the year of assessment can properly be treated as a loss and deducted from the profits, but a

debt which had become a bad debt before the year of assessment cannot be so treated. It is only in cases in which the method of accounting

regularly adopted by a particular assessee is not the cash system but any other system that a question may arise whether the expenditure incurred

by the assessee in the previous year could be charged in the assessment year, or the liability has been inclined by the assessee in the assessment

year could be charged as an expenditure in that year.

28. For one reason or the other, the assessee-company did not show the expenditure incurred by it in the year in which the amount was spent nor

has it been held by the Tribunal that the assessee-company had regularly adopted a method of accounting under which it could carry forward the

expenditure incurred by it in a particular year to the subsequent year. Under these circumstances, we answer question No. 1 of Reference No.

12/63 in the negative.

29. Now we take up question No. 2 of Reference No. 12/63. To answer this question we have to determine whether, in the circumstances of the

case, the profits on the sales effected by the assessee-company in the assessment year 1950-51 accrued in Part A State or in Part B State. The

relevancy of this will be apparent by noticing some of the relevant provisions of the Tax Concessions Order. The Order was made by the Central

Government in exercise of the powers conferred by Section 60A of the Indian Income Tax Act, 1922. The purpose of making this Order was that

in some parts of the territories of Part B States, there was no Income Tax. In other parts, Income Tax was leviable but on a rate different from that

prevalent in Part A State. It was thought proper that certain concessions may be granted for a limited period to those persons who had been

earning profits and gains in Part B States. The relevant part of paragraph 4 of that Order runs as follows:

4. Scope of the main concessions.--(1) The provisions of paragraphs 5, 6, sub-paragraph (1) of paragraph 11, 12 and 13 of this Order shall--.

.....

(iii) in the case of any other assessee who is not resident in the previous year in the taxable territories or in the taxable territories other than Part B

States, to so much of income, profits and gains included in his total income as accrue or arise in any Part B State and are not deemed to accrue or

arise, or are not received or deemed to be received within the meaning of Clause (a) of Sub-section (1) of Section 4 of the Act, in the taxable

territories other than the Part B States.

30. For the assessment year which are under consideration by us in both these references paragraphs 6 and 6A are applicable in the case of the

assessee-company. The relevant parts of these paragraphs run as follows :

6. Income of a previous year which does not fall under paragraph 5.--The income, profits and gains of any previous year ending after the 31st day

of March, 1949, which does not fall within paragraph 5 of this Order shall be assessed under the Act for the year ending on the 31st day of

March, 1951, or on the 31st day of March, 1952, as the case may be, and the tax payable thereon shall be determined as hereunder :

In respect of so much of the income, profits and gains included in the total income as accrue or arise in any State other than the States of Patiala

and East Punjab States Union and Tr a vancore-Cochin-- .....

6A. Income, profits and gains chargeable to tax in the assessment years 1952-53, 1953-54 and 1954-55.--The income, profits and gains of any

previous year which is a previous year for the assessment for the year ending on the 31st day of March, 1953, 1954 and 1955, shall be charged to

tax at the Indian rates of tax, provided that from the tax so computed, there shall be allowed in each year, rebate at the percentage thereof

specified hereunder :

In respect of so much of the income, profits and gains as accrue or arise--

(a) in the States of Saurashtra, Madhya Bharat or Rajasthan, to any assessee, at the rate of 40 per cent., 20 per cent, and 10 per cent.,

respectively, for the assessment for the year ending on the 31st day of March, 1953, 1954 and 1955;.....

31. Under paragraph 6, tax is payable only in respect of profits and gains included in the total income as accrues or arises in any Part B State other

than the State of Jammu and Kashmir and the States of Patiala and East Punjab States Union and Travancore-Cochin. The Tribunal has taken the

view that in Part A State in the year ending on 31st March, 1951 (assessment year 1951-52), the profits on the sale of Rs, 8,75,568 accrued to

the assessee-company. The question as framed is whether there was any material before the Tribunal for taking this view.

32. The assessee-company was carrying on business of excavating gypsum and selling it to its customer. The working of excavating the gypsum

was confined to an area which formed part of the erstwhile Bikaner State. The business of selling gypsum extended to parties who not only resided

in Part B State but also to the residents of the Part A State. The statement of the case in paragraph 7 mentions the nature of contract and the

method and manner adopted by the assessee for the performance of those contracts. It may be summarised in the following manner :

(1) Contracts for the supply of gypsum were the contracts for supply of unascertained goods.

(2) Gypsum raised by the assessee-company was appropriated towards various contracts by the mines manager of the company at Jamsar.

(3) Gypsum was sold to parties in both Part A and Part B States f.o.r. Jamsar, Bikaner.

(4) The railway receipt was drawn in the name of the buyer and the goods moved at the buyer"s risk.

(5) The railway receipts without any kind of seller"s lien on them were sent in the usual course of business to buyers through post, and in the case

of Sindri Fertilizer Project, the railway receipts were handed over to its representative posted at Jamsar.

33. In our opinion, under these circumstances, the property in the goods passed to the buyer at Jamsar and it must, therefore, be held that the

profits on such sales accrued to the assessee-company at Jamsar. In this connection we may refer to the case of The Commissioner of Income

Tax, Madras Vs. Mysore Chromite Limited,

Placing of the goods on board the steamer named by the buyer under a f. o. b. contract clearly discharges the contractual liability of the seller as

seller and the delivery to the buyer is complete and the goods may thenceforward be also at the risk of the buyer against which he may cover

himself by taking out an insurance. Prima facie such delivery of the goods to the buyer and the passing of the risk in respect of the goods from the

seller to the buyer are strong indications as to the passing also of the property in the goods to the buyer but they are not decisive and may be

negatived, for u/s 25 the seller may yet reserve to himself the right of disposal of the goods until the fulfilment of certain conditions and thereby

prevent the passing of property in the goods from him to the buyer.

34. In that case the contracts themselves required the buyers to open a confirmed irrevocable bankers" credit for the requisite percentage of the

invoice value to be available against such documents and this was taken to be a clear indication that the buyers would not be entitled to the

documents, that is, the bill of lading and the provisional invoice, until payment of the requisite percentage was made upon the bill of exchange.

Under the contract, it was not obliged to part with the bill of lading which was the document of title to the goods unconditionally. It may also be

mentioned that bill of lading was issued in the name of the assessee in that case.

35. In the case before us, the property in the gypsum passed to the buyers at Jamsar, in any case at Jamsar railway station when the goods were

loaded. The railway receipts were drawn in the name of the buyers and from Jamsar the goods moved at buyers'' risk. The railway receipts were

handed over unconditionally to the buyers. The assessee-company reserved no lien on the railway receipts. With the handing over of the railway

receipt, the property in the gypsum passed to the buyer. Thus profits on all the sales accrued to the assessee-company at Jamsar and there was no

material before the Tribunal to hold that profits to the assessee-company accrued in Part A States.

36. It has been urged by learned counsel for the department that the basis of assessment by the Appellate Assistant Commissioner was receipt of

the sale price and he has contended that the matter of receipt of sale price is material for assessment for the assessment year 1951-52, in view of

the provisions contained in paragraph 4(1)(iii) of the Concessions Order because paragraph 6 is not applicable unless the provisions contained in

paragraph 4 are satisfied. We have scrutinised question No. 2 and it is clearly confined to seek our opinion on the question whether in the

circumstances of the case the Tribunal was right in holding that the profits on the sales accrued in Part A States. We need not, therefore, make any

pronouncement whether because of the provisions contained in para. 4(1)(iii) the assessee-company will not be entitled to get the concession

granted in para. 6 for the assessment year 1950-51. If this point is raised before the Tribunal, it shall determine it. At present, we are not

concerned with this point. Our answer to question No. 2 in Reference No. 12/63 is in the negative. In view of our answer to question No. 1, we

do not think it necessary to answer question No. 3.

37. Now we take up questions raised in Reference No. 13/63. In the light of our observations in connection with question No. 2 of the Reference

No. 12/63 we answer question No. 1 of this reference in the negative. We may further point out that paragraph 4 of the Taxation Concessions

Order has no application to the assessment year 1952-53. It is paragraph 6A which would govern the concessions to be granted to the assessee in

this year. In view of the answer given by us to question No. 1 of this reference we need not answer question No. 2 of this reference.

38. We take up question No. 3. On a careful perusal of the judgment of the Income Tax Appellate Tribunal, it appears that the litigation in

connection with which the expenses were incurred was that the petitioner by filing a writ petition sought to restrain the State of Rajasthan from

granting lease of certain plots of land on the basis of Clause (8) of the lease deed executed in favour of the assessee-company. Clause (8) of the

lease deed runs as follows:

8. If at any time during the term of the lease hereinbefore mentioned, any deposit of gypsum, other than that delineated in the maps and plans

annexed to the schedule, be found in any part of the State the licensees shall have the first option for refusal for the grant of licence for such

deposits on terms to be mutually agreed upon.

39. The Appellate Tribunal has taken the view that, in filing the writ petition, the assessee-company was trying to defend its right to any asset which

was being employed by it for the purpose of carrying on its business. But if the Government of Rajasthan was to grant the lease to the assessee

under this clause, it would be a new asset. In these circumstances, expenditure incurred by the assessee was hold to be a capital expenditure. In

our opinion, in undertaking the litigation the assessee-company was paving a way to secure contract of lease of other plots of land to ward off the

competition and to earn further profits. Under these circumstances, we do not think that the view taken by the Tribunal was wrong. The question is

answered in the affirmative.

40. As a result of our aforesaid discussion in Reference No. 12/63, the following answers are given to the questions :

Question No. 1 is answered in the negative.

Question No. 2 is answered in the negative.

Question No. 3 need not be answered.

41. In Reference No. 13/63 the questions framed by the Tribunal are answered hereunder:

Question No. 1 is answered in the negative.

Question No. 2 need not be answered.

Question No. 3 is answered in the affirmative.

Parties to bear their own costs in these references.