(1958) 03 BOM CK 0047

Bombay High Court

Case No: Income-tax Reference No. 56 of 1957

Commissioner of Income Tax, Bombay North, Kutch and Saurashtra		APPELLANT
	Vs	
National Mills Co. Ltd. (In Liquidation)		RESPONDENT

Date of Decision: March 17, 1958

Acts Referred:

- Income Tax Act, 1922 - Section 10, 24(2)

Citation: (1958) 34 ITR 155

Hon'ble Judges: Chagla, C.J; S.T. Desai, J

Bench: Division Bench

Advocate: G.N. Joshi, for the Appellant; N.A. Palkhivala, for the Respondent

Judgement

Chagla, C.J.

The decision of this reference may turn on what, in our opinion, is essentially a question of fact. The assessee company carried on business of manufacturing textiles and it ceased manufacturing textiles in April, 1949. It got into financial difficulties and an order of winding up was made by the court on the 16th of February, 1950. In March, 1950, the liquidator took charge of the assets of the assessee company. On the 23rd of October, the liquidator executed a lease in favour of the Sardar Spinning and Weaving Mills, and by this lease, and the lessors received as consideration Rs. 36,900 per month. There are three or four provisions of the lease to which attention might be drawn. One is that the duration was for a period of three years, but the lessees had as option to renew it for a further period of two years, and there was also an option given to the lessees to purchase the plants and machinery for a price of Rs. 20 lakhs, and this option was to be exercised at the expiration of the lease or the further period if the option was exercised by the lessees. The lessors also covenanted with the lessees to assist them in the running

of the mill and in securing quotas, licences, permits etc. and to place at the disposal of the lessees such quotas, licences, permits etc. which under law they could legally transfer, and the lessees covenanted to provide and allow the lessors accommodation in the demised premises for their use as offices and records free of rent.

2. Now, in the assessment years 1951-52 and 1952-53, the lessors claimed to set off the income received from letting out the plants and machinery against the losses in the previous year under the provisions of section 24(2) of the Income Tax Act. This claim was resisted by the Department on the ground that the business of the assessee had come to an end and that there was no intention on the part of the liquidator to do business, and, therefore, the letting out of the plants and machinery did not constitute a business activity. The assessee on the other hand contended that the income derived from letting out the plant and machinery was an income from carrying on business and, therefore, it was entitled to the benefit of section 24(2).The Tribunal held in favour of the assessee. An assessee carrying on business utilises certain assets as business or commercial assets. With the help of these assets the assessee carries on its business and makes profits. There is another way by which the assessee may also make profits out of these assets. Instead of carrying on business itself, it may permit someone else to use these assets and carry on the same identical business. Even in such a case, the activity of the assessee would be a business activity. It would be carrying on the same business through a different instrumentality. It is not necessary that in order that the income of the assessee should be business income, it should be produced by the assessee utilising the business assets itself. So long as those assets are used as business assets, it is irrelevant whether the business assets are exploited and used by the assessee itself or someone else. It is true that you have a different situation under certain circumstances. The assessee may stop doing business all together, and these assets may cease to have the character of business or commercial assets. Then, they take on an entirely different character. They become capital assets, and qua those assets the assessee is not carrying on any business, but qua those assets the assessee has become their owner. As an owner the assessee may also exploit those assets and receive income. But the income which it receives is no longer business income because no business is being carried on and the assets are not business assets. In such a case, the income would be an income derived by the owner from his capital assets, and the head of income under which such income would fall for the purpose if Income Tax Act would be section 12 and not section 10 . Whether a business is carried on or not and whether assets of an assessee are business assets or not are question of fact, and they must be decided by Tribunal on the evidence led before it. They only jurisdiction of the High Court is consider whether whether there was any evidence for the Tribunal coming to a particular finding. They principles, we have just enunciated, are clear and well-established and they two decisions to which Mr. Joshi referred, have not in any way detracted from these principles or laid down any

principle which is in variance or contrary to these principles.

3. Now, let us turn to these decisions. The first decision is a decision of the Supreme Court. That is the case of Commissioner of Excess Profits Tax v. Shri Laxmi Silk Mills. That was an appeal from this court. and this court had taken a narrower view of the assessee''s right to earn business income from its commercial asset than the Supreme Court did. The view taken by this court was that if a commercial asset could be used as such by an assessee and assessee instead of using it itself lets it out to someone else, then income from that commercial assets would be a business income. Therefore, the qualification which this High Court introduced in the exploitation or use of the commercial asset was that it was capable of being utilised as such by the assessee itself. the Supreme Court, while generally accepting the view taken by us, came to the conclusion that the qualification introduced by us was not justified and the principle that the Supreme, Court laid down was that if an asset was a commercial assets, then if it was used by a lessee instead of by the assessee itself, then income from that commercial asset was a business income. It made no difference even if the assessee itself was not in a position at the time to exploit or use that commercial asset. Now, the important thing note is what the Supreme Court at page 456 states :
"It may be observed that no general principle can be laid down which is applicable to all cases, and each case has to be decided on its own circumstances."

4. The latter case is also a decision of the Supreme Court and that is the case of Narain Swadeshi Weaving Mills. v. Commissioner of Excess Profits Tax. Here again the Supreme Court considered whether the income earned was from commercial asset or in the course of business, as a question of fact; and at page 772 they referred to the facts found by the Tribunal, and the most important finding was that the assessee firm had put it out if its power to use the plant, machinery etc. for it had no right in the lands and buildings where the plant, machinery, etc. had been installed and on this essential fact, apart from other fact, the conclusion was irresistible that the assessee firm was not carrying on business, when it lets out its plant and machinery. It had shown a clear unequivocal intention not to carry on business by selling the lad on which the plant and machinery had been installed. Therefore. neither case throws any light on the question as to whether under given facts and circumstances, the assessee company is carrying on business or whether the asset, which it is exploiting by letting it out, is a business or a commercial asset.

5. In a judgment of this court in Akbar Manufacturing & Press Co. v. Commissioner of Income Tax We emphasised the fact that the question which is now before us is a question of fact and we pointed out at page 106 that it was clear that we were not assessing the evidence on which the Tribunal came to its conclusion. All that we had to consider was whether there was evidence to justify the finding, and in that case the two pieces of evidence, which we felt was sufficient to justify the finding of the Tribunal, was (1) that under the terms of the lease, the rent received by the lessor

was a fluctuating rent dependent upon the profits make by the lessees, and (2) that the hirer was entitled to the free use of certain portion of the demised premises. Now, Mr. Joshi says that in this case the three material fact, which can lead only to one conclusion are : firstly that the business of of manufacturing textiles had ceased and the company had gone into liquidation. The second fact, according to Mr. Joshi of equal importance, is that although the lease was for a period of three years, an option was given to the lessee to renew it for a further period to two years and finally the facts that option was given to the lessee to purchase the mill at a fixed price. According to Mr. Joshi, all these circumstances can lead only to one conclusion; and there is no evidence to the contrary which would justify the view taken by the Tribunal. Now, undoubtedly the circumstances relied upon by Mr. Joshi are pieces of evidence. They are no more than prices of evidence. which the Tribunal is entitled to consider. We do not for a moment accept the position taken by Mr. Joshi that all these circumstances lead only to one conclusion. the fact that the assessee had stopped manufacturing textiles does not necessarily mean that it has stopped caring on business. Even without going into liquidation, a textile company may come to the conclusion that for a certain period it would be wiser to allow someone else to manufacture textiles than it should do itself. The fact that the lease was for a particular duration with an option to renew it does not indicate a definite unequivocal intention to stop business, because there was no guarantee that the lessee would necessarily exercise that option. Even the option to purchase at the end of a particular period does not clearly show that till that period had reached, the activity of the assessee was not a business activity.

6. The fact that the company had gone into liquidation does not prevent the liquidator from carrying on business.

7. Now, as against the circumstances relied upon by Mr. Joshi, there are the circumstances relied upon by Mr. Palkhivala. The one is that the lessors had to render assistance to the lessees in the carrying on of the business and Mr. Palkhivala says that that indicates that the lessors were participating in the business, were anxious that the business should go on; and this, according to Mr. Palkhivala, would have been so, if all that the lessors were doing was to exploit their assets as capital assets. Mr. Palkhivala also relies on the provision, which is similar to the provision in the Akbar mills case, that a part of the demised premises was allowed to be used by the lessors free of rent. This again is an indication of the desire of the lessors to carry on business. But whatever that may be we have a clear finding of the Tribunal that the assets in question were business assets at the relevant period. Therefore, there is a clear finding and implicit in this finding is that during the relevant period, the assessees carried on business and used the plants and machinery in that business. They did not work the assets themselves but asked someone else to work them, yet all this was in the course of their business. But, surely this is not a case where it can be said that there is no evidence to justify the finding of the Tribunal. It may be there is evidence on one side. It may be there

evidence on the other side. The appreciation of evidence is for the Tribunal and if the Tribunal has come to its conclusion on a consideration of all the evidence before it, it is not for us to take a different view on the record.

8. Mr. Joshi wanted to raise another point that even assuming that the assessee carried on business by means of letting out the plants and machinery, that business was different from the original business of manufacturing textiles and section 24(2) would have no application because that required that the business in which losses were made and the business which subsequently made profits, in respect of which a set-off was claimed, were the same business. We do not find from the record that this contention was ever put forward by the Department before the Tribunal. The only contention was and on which the question has been referred to us was whether business was carried on, and whether the income was from business to which section 24(2) applied, and, in our opinion, the Department was wise in not putting forward that contention before the Tribunal. It is difficult to understand how, if the assessee had carried on business by letting out the plants and machinery, it was not actually carrying on the the same business as the business of textile manufactures. This particular asset was used for the purpose of manufactures textiles by the assessee themselves, and this asset was used precisely for the same purpose by the lessees. How can it conceivable be said that the two businesses were different! But whatever the position may be, in our opinion, it is not open to the Department to put forward this entirely new contention before us.

9. The result, therefore, is that the assessee must succeed, and we will answer the question submitted to us,

"Whether on the facts and circumstances of the case the sum of Rs. 73,800 and Rs. 3,84,000, realised by the assessee by leasing out the factory was income which could be set off against losses from the business of the manufacture of textiles brought forward from the preceding year u/s 24(2) of the Income Tax Act ? in the affirmative. We had added the figure of Rs. 3,84,000, because through an oversight that figure has been omitted. The figure of Rs. 73,800 relates to the assessment year 1951-52 and Rs. 3,84,000 to the assessment year 1952-53.

10. In view of our decision on the first question, the second question does not arise.

11. Commissioner to pay the costs.

12. Reference answered accordingly.