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MAHARAJA-DHIRAJ OF DARBHANGA v. COMMISSIONER OF INCOME-TAX.

COURTNEY TERRELL, C. J. AND FAZL ALI, J.

legal opinions in support of their case. It appears that in fact no such practice exists and we accept the statement of the officer that no such request was in fact made by him in this case but the petitions of assessees sometimes have annexed to them, as in the case under consideration, opinions by learned members of the legal profession. The Income-tax Officer has not felt justified in rejecting the petitions on this ground though neither he nor any superior officer has been influenced by the names of those who furnish the opinions. We are glad to find that the supposed practice which we reprobated has no existence in fact. Nevertheless we think it necessary to say that no petition to any officer who has to administer the law should contain or have annexed to it any such opinions. It is quite legitimate that the petitioner should state his legal contentions but the fact that such contentions have the support of the opinion of any practitioner is entirely irrelevant and the statement of such fact is improper. The correct course for the tribunal in such cases is to state that the petition cannot be considered until the statements as to the opinion are removed. It is not open to petitioners to include in their petitions improper and irrelevant matters and the position is analogous to that in which a petitioner might set forth matters of an irrelevant and scandalous nature, and in all such cases the petition should be returned for excision of such matter and after such excision, but not until it shall have been effected, the petition may be considered on its merits. These observations will form part of our judgment.

REFERENCE UNDER THE INCOME-TAX ACT, 1922.

1932.

April 27.

Before Courtney Terrell, C.J. and Fazl Ali, J.

MOTIRAM ROSAN LAL COAL COMPANY, LIMITED

v.

COMMISSIONER OF INCOME-TAX.*

Income-tax Act, 1922 (*Act XI of* 1922), *section* 10(2) (*vi*)—"*original cost thereof to the assessee*", *meaning of—words*,

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* Miscellaneous Judicial Case no. 2 of 1931.

whether refer to the original cost to the assessee or his predecessor—cost must be taken to refer to genuine original cost.

Section 10, Income-tax Act, 1922, provides :—

"(1) The tax shall be payable by an assessee under the head "Business" in respect of the profits or gains of any business carried on by him.

(2) Such profits or gains shall be computed after making the following allowances, namely :—

....

(vi) in respect of depreciation of such buildings, machinery, plant, or furniture being the property of the assessee, a sum equivalent to such percentage on the original cost thereof to the assessee as may in any case or class of cases be prescribed..........."

Held, (i) that the words "original cost thereof to the assessee", occurring in section 10(2) (vi), mean the original cost to the assessee and not to his predecessor, the previous owner of the business.

Commissioner of Income-tax, Bombay v. *The Saraspur Mills Company, Ahmedabad*(1), followed.

Massey and Company v. *Commissioner of Income-tax, Madras*(2), dissented from.

(ii) that the words must be strictly construed and must be taken to refer to the genuine original cost to the assessee and not necessarily to anything which the assessee may have stated to be the original cost.

Reference under section 66(2) of the Income-tax Act, 1922.

The facts of the case material to this report will appear from the following statement of the case by the Commissioner of Income-tax.

SIR,

I have the honour to submit for the decision of the Hon'ble Court a statement of case on two questions of law arising out of the assessment of Messrs. Motiram Roshan Lal Coal Company, Limited, for the year 1929-30.

2. The facts of the case are as below :—

The Motiram Coal Company was a partnership running a colliery.

(1) (1931) I. L. R. 56 Bom. 129.
(2) (1928) 115 Ind. Cas. 814, F. B.

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The partners were:

(1) Baijnath Gopalka, Hindu undivided family—4 annas.

(2) Roshan Lal Choudhry, Hindu undivided family—5¼ annas.

(3) Nine separate Hindu undivided families, all branches of the same family "Choudhary"—aggregating 2¼ annas.

(4) Two separate Hindu undivided families, branches of "Nawalgarias"—2¼ annas.

(5) Rookman and Nawalgaria (personally)—2¼ annas.

Some years ago, there was a dispute among the partners which culminated in a Title suit before the Sub-Judge of Dhanbad (Roshan Lal Marwari *versus* Motiram Marwari and others).

To quote from an Indenture, dated 30th September 1924:—

"Whereas the partners hereto of the 1st, 2nd, 3rd, 4th and 5th parts (the five partners referred to above in this reference) are the persons interested in the result of such suit and also in the Colliery and its business and whereas with a view to avoid the costs of litigation and with a view to compromise all disputes between them, the parties hereto of the 1st, 2nd, 3rd, 4th and 5th parts have arrived at and entered into an agreement on amongst others the terms that the parties hereto would float a private company under the name and style of Motiram Roshan Lal Coal Company, Limited, and the said colliery lands with plants, tools and implements, machineries, coal, etc., and all claims and outstandings and rights whatever including the business of Motiram Coal Company would be sold, conveyed and delivered to the Company.

The purchase price paid by the company to the partnership was Rs. 6 lacs and according to the indenture Rs. 5 lacs represented the value of the moveable properties and rupees one lac that of the immoveable properties. Possession was delivered of the moveable properties some time before the 30th September 1924 and possession of the immoveable properties was delivered by the Indenture of the 30th September 1924. The price paid to the partnership was not in cash, but in the shape of shares in the new private company which was floated. There were no other share-holders in the private company beyond the persons who were allottees of the above shares paid as consideration. The share-holders were all members of the families which constituted the partnership. The relative shares allotted to the members of each of the families were not exactly identical with the relative share of the families in the partnership, apparently because the allotment was the result of a compromise in a suit. The company also had two ladies of the family as share-holders. In other words, each family or individual constituting the partnership received shares, some in the name of the family and some in the names of individual members thereof.

Under the same indenture of 30th September 1924, referred to above, it was agreed and declared that the company "would pay all liabilities of the firm of Motiram Coal Company" and there were the usual mutual Indemnities against the various possible contingencies arising out of the sale.

3. So far as can be traced by me the partnership had been running the colliery since 1912. The assessments in the past both on the company and probably also on the firm had been made year after year under section 23(*4*) of the Indian Income-tax Act XI of 1922 by estimate to the best of the Income-tax Officer's judgment owing to some default or other on the part of the assessee. The company claim to have taken over from the firm machinery, plant and buildings for a sum of about Rs. 3—8 lacs. The company have made subsequent additions to the plant, machinery, etc., at a cost of about Rs. 54,000.

4. The point in dispute between the department and the assessee company relates to the machinery, plant, etc., taken over from the firm for Rs. 3—8 lacs in 1924. Under section 10 (*2*) (*vi*) of the Indian Income-tax Act, the profits or gains of an assessee carrying on business shall be computed after making the following allowances, namely :—

" In respect of depreciation of such buildings, machinery, plant or furniture being the property of the assessee as sum equivalent to such percentage on the original cost thereof to the assessee as may in any case or class of cases be prescribed ".

The Income-tax Officer understood the expression " original cost to the assessee " occurring in the above section to mean the cost paid by the assessee company to the predecessor firm in 1924 and allowed the claim to depreciation on that basis. The Assistant Commissioner, to whom the assessee went up on appeal on other points, held, on the other hand, that " the original cost to the assessee " in the above section meant the cost originally paid by the predecessor in business and therefore asked the assessee to produce evidence to show when the various items of machinery, plant and buildings were purchased by the predecessor firm and at what price. On the evidence produced before him he was prepared to allow depreciation only on a capital cost of Rs. 30,949 against depreciation on 3—8 lacs as claimed. The Assistant Commissioner accordingly enhanced the assessment after giving the usual notice to the assessee to show cause against the enhancement. The assessee appealed to my predecessor under section 32 against the enhancement made by the Assistant Commissioner. Following the ruling of the Madras High Court in *Commissioner Income-tax* v. *Massey and Company*(1), in which the same point had been already decided, my predecessor held that the enhancement made by the Assistant Commissioner was correct. The present reference arises out of his appellate order.

5. The assessee has raised two questions of law, namely,—

(*1*) Whether the application of section 26 of the Act is confined for the purpose of assessment only to the year during which one business has succeeded another or during which there has been a change of ownership? And

(*2*) Whether the " original cost " appearing in sub-clause (*vi*) of clause (2) to section 10 of the Act means the original cost paid by the assessee or that paid by the predecessor in business of the assessee?

(1) (1928) 115 Ind. Cas. 814, F. B.

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6. I am unable to see how the first question of law arises in this case. The assessment in dispute now was not made under section 26 and the question cannot therefore arise on the facts. In the judgment of the Madras High Court in *Massey and Company's*(1) case, apparently the Hon'ble Judges were influenced by section 26(2). Apparently they argued that if an assessee is treated as successor for one purpose, he must be treated as successor for all purposes. The answer to this argument appears to me to be that in the year after succession the depreciation always is calculated on the cost to the predecessor while in subsequent years there is no question of treating the assessee as successor for any purpose. The first question therefore is not referred.

7. As regards the second question of law, I am unable to see any material distinction between the case of *Massey and Company*(1) and the present case. In the application for a reference to the High Court the assessee points out the following features distinguishing this case from *Massey and Company's*(1) case.

(*a*) In *Massey and Company's case*(1), both the predecessor and the successor were "going on concerns", whereas in present case, the predecessor was a "going on concern", while the successor was "just then formed" i.e., a newcomer to the business.

(*b*) The successor in the present case did not purchase the old firm as a "going on concern", but merely purchased the coal, land, building, etc.

(*c*) In *Massey and Company's*(1) case, the successor paid the predecessor's nominees a sum of Rs. 10 lacs in addition to the price of machinery building, etc., "to represent the price of the concern as going on that date".

The assessee company also puts forward another ground, viz., the share-holders of the successor company in the present case were not identical with the partners of the predecessor firm.

8. I am unable to see how the last ground referred to above is relevant at all. It is obviously not necessary in order to establish succession that the shareholders of the purchaser company should be identical with the partners of the vendor firm. If that were so, there could be no succession in the case of business, of one individual by another. The argument used by the assessee is so obviously unsound that it needs no further discussion.

9. Taking now the distinguishing features of this case referred to by the assessee, the fact that in *Massey and Company's*(1) case, the successor was already in business, whereas in the present case, the successor was not already in business, does not affect the question whether there was a succession, which is the material point in common between the two cases. The second argument of the assessee that the assessee company did not purchase the business of the old partnership, but only certain specific assets is at variance with facts. According to the Indenture of 30th September 1924, already referred to, the Company received from the partnerships not merely specific assets and liabilities, but "all claims and outstandings and rights whatever including the business of Motiram Coal Company". If that

(1) (1928) 115 Ind. Cas. 814, F. B.

did not constitute succession, nothing can. As regards the third argument, the assessee appears to have misread the facts in *Massey and Company's*(1) case. Paragraph 3 (*a*) of the statement of the case in that case is as below :—

'By a resolution of the Directors, dated 5th January 1924 the petitioners Company resolved to purchase the business of the old company as a going concern as from 1st January 1924 for the consideration following, *viz.*, Rs. 10 lakhs of ordinary shares in Massey and Company, Limited, (Petitioner Company) issued as fully paid up to the nominees of the Madras Engineering Works, Limited, (Old Company) Rs. 32,000 and Rs. 3,76,000 being the consideration for the land and buildings, respectively, Rs. 3,52,000 being the consideration for the moveable plant consisting of machinery etc., Rs. 2,00,000 fixtures and fittings, Rs. 70,000 loose tools, Rs. 18,000. Motor cars and launches, Rs. 14,000 electric plant. Rs. 50,000 and Rs. 2,40,000 being the consideration for the remaining assets after providing for liabilities and expenses ".

The assessee interprets this to mean that it will be evident from the facts as stated in the letter of reference to the High Court that besides the price for machines, buildings, lands and other assets after making allowance for the liability paid by the new Company to the old Company, a further sum of Rs. 10,00,000 was paid to the nominees of the old Company in the shape of fully paid up shares and this amount represents the price of the concern as going on at that date. This is clearly wrong. The assessee probably intends to say that in *Massey and Company's*(1) case there must have been some consideration paid for goodwill, whereas in the present case none was paid. Even so, the non-payment of anything for goodwill can make no difference to the fact of succession, when according to the Indenture as quoted above, the business of the predecessor as taken over in its entirety by the successor.

10. The distinguishing features referred to by the assessee have therefore no significance. The ruling in *Massey and Company's*(1) case is that if there is succession to a business, " the original cost to the assessee " in section 10(*2*) (*vi*) should be calculated with reference to the price paid by the predecessor in business both for the purpose of that clause and for the purpose of the proviso to that clause.

11. The Department has hitherto followed the above ruling, but the question is a question in regard to which possibly more than one view might reasonably be taken. The Hon'ble Judges of the Madras High Court followed *Scottish Shire Line Ltd.*, v. *Letham*(2) holding that " there was no material difference in the language of the Indian and English Acts regarding allowance for depreciation and that the aims and objects of the two Acts were the same in respect of such allowance ". But, whereas the English Acts allow " a deduction representing the diminished value by reason of wear and tear " simply, the Indian Act [Section 10(*2*) (*vi*)] specifies a percentage on the original cost to the assessee and " assessee " means the person by whom income-tax is payable [Section 2 (*2*)]. It might possibly be argued, not unreasonably, that here there is material difference between the language of the English and Indian Acts.

K. P. Jayaswal and *A. K. Mitra*, for the assessee.

C. M. Agarwala, for the Commissioner of Income-tax.

(1) (1928) 115 Ind. Cas. 814, F. B.
(2) 6 T. C. 91.

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MOTIRAM ROSAN LAL COAL COMPANY, LIMITED *v.* COMMISSIONER OF INCOME-TAX.

COURTNEY TERRELL, C.J. AND FAZL ALI, J.—The question which has been formulated for our decision is

"Whether the 'original cost' appearing in sub-clause '(*vi*) of clause (2) to section 10 of the Act means the original cost paid by the assessee or that paid by the predecessor in business of the assessee."

Our attention has been called to the decision of the Madras High Court in the case of *Massey and Company* v. *Commissioner of Income-tax, Madras*(1) and to the decision of the Bombay High Court in the case of *Commissioner of Income-tax, Bombay* v. *The Saraspur Mills Company, Ahmedabad*(2). In our opinion the decision in the latter case is right and we are unable to agree with the decision of the Madras High Court. The words in section 10(*2*) (*vi*) "original cost thereof to the assessee" must be strictly construed and refer of course to the genuine original cost to the assessee and not necessarily to anything which the assessee may have stated to be the original cost. No question of fact, however, arises in the particular case before us and we merely make this latter observation with a view to preventing possible frauds on the Department by reason of a fictitious price being placed in the purchase of a business upon the portion of the purchase price to be allocated to business machinery or plant. The answer to the question propounded should be in the affirmative. The assessee is entitled to his costs which we fix at two hundred rupees.

Order accordingly.

APPELLATE CIVIL.

Before Courtney Terrell, C.J. and Fazl Ali, J.

1932.

May 4, 5, 6. July 28.

BASHIST NARAIN SAHI

v.

SIA RAMCHANDRA SAHI.*

Succession Act, 1925 (*Act XXXIX of* 1925), *section* 124, *meaning of—specified uncertain event must happen before the testator's death when the fund or property is distributable.*

* First Appeals nos. 237 and 243 of 1928, against a decision of F. F. Madan, Esq., I.C.S., District Judge of Muzaffarpur, dated the 23rd August, 1928.

(1) (1928) 115 Ind. Cas. 814, F. B.

(2) (1931) I. L. R. 56 Bom. 129.