INCOME-TAX REFERENCE.

Before Sir Arthur Page, Kt., Chief Justice, Mr. Justice Das and Mr. Justice Mya Bu.

1933
July 12.

IN RE THE COMMISSIONER OF INCOME-TAX, BURMA

v.

E. SOLOMON & SONS.*

Income-tax Act (XI of 1922), ss. 2 (2), 10 (2) (vi)—"Assessee" under s. 10—Depreciation allowance—Property acquired by bequest—"Original cost to the assessee"—Value at the date of acquisition—Probate charges.

The term "assessee" in s. 10 (2) (vi) of the Income-tax Act means the assessee as defined in the Act, that is, the person by whom income-tax is payable.

Commissioner of Income-tax, Bombay v. *Saraspur Mills Company*, I.L.R. 56 Bom. 129; *Motiram Coal Company* v. *Commissioner of Income-tax*, I.L.R. 12 Pat. 12—*referred to.*

Where an assessee claims an allowance for the depreciation of his property under s. 10 (2) (vi), which he acquired by bequest, "the original cost thereof to the assessee" means and is the real value of the property at the time when the assessee acquired it, less the expenditure incurred by an assessee for the purpose of completing his title, such as probate charges.

Massey v. *Commissioner of Income-tax, Madras*, 3 I.T.C. 302—*dissented from.*

The Commissioner of Income-tax, Burma, referred the following case to the High Court in accordance with the provisions of s. 66 (2) of the Indian Income-tax Act, 1922:

Messrs. E. Solomon & Sons (hereinafter called the assessees) are a firm doing business in Rangoon as General Merchants and suppliers of water. The business was originally owned by Mr. Sasseon Solomon, who died in 1922 and bequeathed it to his three sons, who continued it.

At the time of Mr. Solomon's death, the buildings, plant, machinery and other depreciable assets of the business were valued at Rs. 9,17,760, and depreciation was allowed on this figure in the 1922-23 assessment.

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* Civil Reference No. 12 of 1933.

When the 1923-24 assessment came to be made, the Income-tax Officer took the view that he should adhere strictly to the provisions of the Act. S. 10 (*2*) (vi), which deals with Depreciation Allowance, provides that it shall be based on the original cost of the asset to the assessee, subject to the prescribed particulars being furnished. Rule 9 prescribes the particulars, one of which is original cost.

The assessees were unable to give the original cost, and relied on the valuation made after their father's death.

The Income-tax Officer therefore rejected the claim for depreciation, because the conditions laid down in the Act were not satisfied. That position has been maintained by the Income-tax Officer and acquiesced in by the assessees in all assessments up to the assessment now in dispute, that for 1932-33.

In the 1932-33 assessment, a copy of which is attached and marked 'A', depreciation on these assets was again refused. This was upheld on appeal; a copy of the appellate order is attached and marked 'B'.

Being dissatisfied with the appellate order, the assessees have asked me to refer two questions to the High Court. The question which I refer is:

> "In the circumstances of this case, was there any 'original cost' of the assets to the assessees, and, if so, how is it to be ascertained?"

The assessees' contention is that they succeeded to these assets by bequest, and that the "original cost" is the value of the assets at the time the bequest took effect.

This contention appears to me to be based on a fundamental misconception as to the difference between "cost" and "value". The "original cost" of an asset to the assessee is obviously what the assessee has paid for the asset. In this connection, I refer to the case of *The Commissioner of Income-tax, Bombay* v. *Saraspur Mills Company, Limited*, Civil Reference 3 of 1931, Bombay High Court, Judgment dated 19th August 1931. Here, apart from any charges such as probate charges, it is clear that the assessees as individuals have paid nothing for the assets. The only questions then that appear to arise are whether charges such as probate charges can be considered as cost of the assets, and whether the fact that the assets are now partnership assets makes any difference to the position.

By "cost" of plant for depreciation purposes, is meant the full cost of placing the plant in a condition to work. Thus the

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cost of erecting the plant is included. On this analogy it might be argued that probate charges are for the assessees expenditure necessary in order to get full control of the plant.

If they are not paid, the assessees might not be able to keep the plant and work it. It is arguable therefore that they are analogous to the cost of erecting the plant. On the other hand, the more correct view appears to be that these charges are of the nature of charges for the transfer of the property, and legal costs of transferring capital assets would not, for example, be considered in ordinary income-tax practice, to be part of the cost of the assets for the purpose of depreciation. I am therefore of opinion that the original cost of the assets to the assessees as individuals was "nil".

The question then is whether bringing the assets into the partnership made any difference. I do not think that it did. A partnership is nothing but the individuals composing it, and this is not a case where one person took over assets at a valuation from another.

I would answer the question referred, therefore, by saying that there was no "original cost" of the assets to the assessees, and nothing, therefore, on which depreciation could be allowed.

A. Eggar (Government Advocate) for the Crown. S. 10 (2) (vi) of the Indian Income-tax Act provides for depreciation allowances in respect of buildings, machinery, plant, or furniture based on their original cost to the assessee, provided the prescribed particulars are furnished. No particulars have been filed in the present case, and the assessee contends that the original cost is the value that he put upon the business at the time he succeeded to it. Cost does not mean value. Rules 8 and 9, made under the Act, do not afford any guidance in cases of this sort because they speak of "prime cost" and there is no prime cost in the present case.

The Act obviously is defective. But it must be construed as it stands, and where there is no

original cost to the assessee there is no room for any depreciation allowance.

In *The Commissioner of Income-tax, Bombay* v. *The Saraspur Mills Company* (1) it was held that the word "assessee" in this section meant the person actually being assessed and not his predecessor. But there was no difficulty in that case, because the assessees succeeded to the business by purchase.

In *Massey & Co., Ltd.* v. *The Commissioner of Income-tax, Madras* (2) the Madras High Court took a different view; but the decision was based on the analogy of s. 26, under which the successor to a business is taxed as though he were carrying on the business in the previous year.

The Patna High Court, in *Motiram Rosan Lal Coal Company, Limited* v. *The Commissioner of Income-tax* (3), followed the Bombay ruling. In *S. Ramanatha Reddiar* v. *The Commissioner of Income-tax* (4) it was pointed out that the "prime cost" must be ascertained before the depreciation allowance can be estimated.

[PAGE, C.J. It may be that this is a *casus omissus*. The Legislature could not have intended to exclude cases where there is no "original cost" to the assessee from the benefit of s. 10 (2) (vi).]

The real value to the assessee is a question of fact to be decided by the Income-tax authorities on the materials before them.

Kalyanwalla for the assessee. Cost in s. 10 (2) (vi) includes "value", for otherwise an assessee who succeeds to a business by operation of law will be

(1) I.L.R. 56 Bom. 129.
(2) 3 I.T.C. 302.
(3) I.L.R. 12 Pat. 12.
(4) I.L.R. 6 Ran. 175, 187.

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in a worse position than an assessee who succeeds to it by purchase. *Scottish Shire Line, Limited* v. *Lethem* (1).

PAGE, C.J.—The question referred is :

" In the circumstances of this case was there any ' original cost ' of the assets to the assessees, and, if so, how is it to be ascertained ? "

The facts are fully set out in the reference and need not be repeated.

S. 10 (*2*) (vi) of the Income-tax Act (XI of 1922) runs as follows :

> (iv) 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 : provided that—
>
> (*a*) the prescribed particulars have been duly furnished :

I am of opinion that the words "the original cost thereof to the assessee" refer to the assessee as defined in s. 2 (*2*) of the Act, that is, the "person by whom income-tax is payable." The construction that I put upon these words coincides with that placed upon them by the Bombay High Court in *Commissioner of Income-tax, Bombay Presidency* v. *The Saraspur Mills Company, Ahmedabad* (2) and by the Patna High Court in *Motiram Rosan Lal Coal Company, Limited* v. *Commissioner of Income-tax* (3). No other construction appears to me to be feasible. Suppose the predecessor in title of the assessee had not purchased the property when it was made, and had himself, purchased it, through how many successive assessees who had been owners of the property is the "original cost" to be traced

(1) 6 Tax Cases 91, 99, 100.

(2) (1931) I.L.R. 56 Bom. 129. (3) (1932) I.L.R. 12 Pat. 12.

back? In my opinion the "assessee" in s. 10 (2) (vi) means the assessee as defined in the Act.

In *Massey* v. *Commissioner of Income-tax, Madras* (1) the Madras High Court held that the calculation for depreciation must be based on the "original cost" to the predecessor in title of the assessee.

In the statement prescribed under Rule 8 reference is made to the "prime" cost, and in the particulars to be furnished to the Income-tax Officer under Rule 9 reference is made to the "original" cost of the property.

Coutts Trotter C.J. was of opinion that there was no material difference between the language of the Indian Income-tax Act and the English Finance Act in this connection. I respectfully beg to differ. It seems to me that the material sections of the two Acts differ *toto cœlo*. In the circumstances I refrain from discussing the English Act because no useful purpose could be served by so doing, and I feel bound to dissent from the construction put upon this section by the Madras High Court.

I am satisfied that it could never have been intended by the Legislature that no allowance should be made for depreciation of "buildings, machinery, plant or furniture" belonging to the assessee, merely because the assessee had acquired title to the property by bequest and not by purchase. It may be that it is a *casus omissus*, and there would be force in such a contention. In my opinion, however, the intention of the Legislature in using the words "the original cost thereof to the assessee", was that the owner to be assessed should not receive an allowance for depreciation based on a capital value of the property higher than or different from the value of

(1) 3 I.T.C. 302.

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the property to the assessee at the time when he originally acquired it. No doubt if the assessee purchased the property the best evidence of the value of the property to the assessee would be the price that he paid for it; but where, as in the present case, the assessees acquired the property otherwise than by purchase, in my opinion "the original cost thereof to the assessee" means and is the real value of the property at the time when the assessees acquired it less the expenditure necessary for the purpose of completing their title. I am disposed to think that the probate charges actually paid by the assessees would be included in such expenditure.

I would answer the question propounded in this sense.

DAS, J.—I agree.

MYA BU, J.—I agree.