

In Re: Shaw Wallace and Co.

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Court : Kolkata

Decided On : Jan-13-1931

Reported in : AIR1931Cal676

Appellant : In Re: Shaw Wallace and Co.

Judgement :

Rankin, C.J.

1. The assessee Messrs.. Shaw Wallace & Co., are a registered firm carrying on business in Calcutta and elsewhere as merchants and managing, agents. The year of assessment with which we are concerned is the year 1929-1930 and the 'previous year' is the year ending 1st December 1928. In addition to their other business the assessee had for many years acted as distributing agents in India for the Burmah Oil Company and also for some years as sole agents in India and Aden for the marketable products of the Anglo Persian Oil Company. In 1928 these two agencies were determined, and a new company called the Burmah Shell Oil Storage and Distributing Company of India Limited became agents for the sale and distribution of the products of the Burmah Oil Company and the Anglo Persian Oil Company. The assessee had at no time had any formal agency agreement with either of these oil companies. The negotiations for the 'transfer' of the agencies to the new company were conducted verbally in London between certain partners of the assessee's firm and representatives of the two oil companies. It does not appear that the assessee owned any plant or stock which had to be taken over by their principals but their office premises at Aden and at

Bombay were the subject of an arrangement which does not enter into the case now before us. The agency of the Burmah Oil Company terminated as at 31st December 1927 and that of the Anglo-Persian Oil Company as from 30th June 1928. The Commissioner of Income-tax in stating the case for the opinion of this Court has annexed and referred to certain letters of which two are important. The first is dated 2nd February 1928 and is written by the managing agents in Rangoon of the Burmah Oil Company to the assesseees in Calcutta:

In accordance with cabled information received from our London office, we now advise you that it has been agreed with your principals in London that in lieu of commission for 1928 in terms of your B. O. C. Oil agency, you will receive as full compensation for cessation of the agency a fixed sum of Rs. 12 lacs. Whether this will be payable in equal monthly or in half-yearly instalments has yet to be advised us. Your accounts sales should therefore be rendered for all spheres as from 1st January 1923 without deduction of commission, and we shall arrange later on receipt of further advices to make payments against the 12 lacs above referred to.

As from 1st January 1928 and until the new Company is established and assumes responsibility for its own staff, you will be in order in debiting the Burma Shell Company with salaries and wages of those of your Oil Department whom it has been agreed to take over, provided of course that they have been meantime employed on Burma Shell Company work. This also applies to any other charges necessarily incurred in the meantime such as the proportion of office rent.

Debit and other liabilities in connexion with the Oil Agency outstanding as at 31st December 1927 will be on your account.

2. The second is written from London by the Anglo Persian Oil company to the assesseees in Calcutta:

In view of other arrangements which have been made my Board have instructed me to send you the enclosed cheque for Rs. 3,25,000 as compensation for the loss of your office as agents to the company.

3. In the case it is not suggested that these letters fail to represent the real bargain or arrangements concluded between the parties. The finding of the Commissioner of Income-tax is that the payment in each case was:

simply to compensate the assesses for the loss of business compensation for loss of assessee's agency.

4. The sum paid by the Burmah Oil company was 11s. 12 lacs and that paid by the Anglo-Persian Oil Company was Rs. 3,25,000. It now appears that upon the cessation of the agencies the assessee had to terminate the service agreements of certain of their staff who were employed in the business of these agencies, and this alone involved the assessee in an expenditure which has been allowed at Rs. 5,41,639, and has been deducted from the sum of Rs. 15,25,000 leaving a balance of Rs. 9,83,361 which has been held by the income-tax authorities to be liable to tax.

5. In the case of the Burmah Oil Company's agency it is clear from the letter of 2nd February 1928 that certain work had been done by the assessee since 1st January 1928 and was still to be done, and that the sum of Rs. 12 lacs was to exclude any further claim for remuneration for this work, salaries and wages and other charges being debited as from 1st January 1928 to the Principal's account. As regards the Anglo-Persian Oil Company's agency, if this terminated at the end of June 1928, it would appear from the circumstances that the assessee had at least six months' notice of the intention to determine it; but this is not expressly found as a fact in the case stated. The questions which have been referred to us are three:

(a) Was not the sum of Rs. 9,83,361 which had been included in the total income of the assessee for purposes of assessment for 1929-30 in the nature of a capital receipt and therefore not income, profits or gains within the meaning of the Income-tax Act ?

(b) If it could be said to be income, profits or gains within the meaning of the Act, was it liable to be assessed under either of Sections 10 and 12 of the Act, inasmuch as : (1) it was not the profits or gains of any business carried on by the

assesseees within the meaning of Section 10 of the Act,; nor (2) income, profits or gains from other sources within the meaning of Section 12 of the Act ?

(c) In the alternative, was not the payment of Rs. 9,83,361 an ex gratia payment in the nature of a present from the Oil Companies in question and was it not therefore exempt under Section i (3) (vii) of the Act The Commissioner of Income-tax has negatived all these contentions of the assesseees.

6. It appears to me that if the assesseees cannot escape by reason of the contention raised in question (a) the other two questions present little chance of escape. If the sums in question or either of them are 'income profits and gains of the previous year' within the meaning of the charging section of the Act (Section 3) it seems to me to be reasonably clear that it cannot be said that they are "receipts not arising from business' within the meaning of Clause vii, Sub-section 3, Section 4 of the Act. Accordingly even if it could be made out that they were not profits or gains 'of any business' so as to be caught by Section 10, the general language of Section 12 would catch them. The real question in the case seems to me to be the first, whether these sums are income, profits or gains within the meaning of the Act at all. The other questions were dealt with by this Court in the case of *In re Turner Morrison & Co. Ltd.* : AIR1929 Cal212 , and I have nothing to add to what was than said upon these points. The first question however as is conceded by the Advocate-General, was not in that case presented to the Court or decided. I have referred to the papers in that case and find that in the statement of facts submitted by the assesseees, attorneys to the Commissioner in that case it was said:

the assesseees having a controlling interest in the company were in a position to present themselves with a gift by way of testimonial irrespective of the fact whether any past relationship existed or not.

7. It was also contended that the assesseees had no claim for damages or compensation of any description and that the precise form of the company's resolution was immaterial. The Commissioner of Income-tax found that the assesseees had a claim for remuneration for the year 1924-25 and that the sum in question represented the remuneration for 1924-25 to which the assesseees were legally entitled and which if the company had not been wound up beyond doubt

have been assessed as income. It should be here explained also that the assesseees in that case had a three-fifths interest in the capital of the company which was in liquidation and that as to three-fifths of the sum in question the transfer of payment was in the circumstances purely nominal. The sole question referred to the Court as a question of law was in the following terms:

On the above facts, is the said sum of Rs. 2,25,000 received by the assesseees exempt from taxation under Section 4 (3) (vii), Income-tax Act (11 of 1927) ?

8. The contention of the assesseees throughout that case was not that the receipt was a capital receipt but that it has no connexion with business at all, being a voluntary gift or testimonial, and as such not income, profits or gains under Section 10 and saved from both Section 10 and Section 12 by Clause 7, Section 4 (3). The case for these reasons is of no authority whatever upon the first of the three questions which we have now to deal with, and having that question now in mind the concluding sentences of my judgment in that case appear to me to exhibit some confusion.

9. We are only concerned with the legal rights of the parties in so far as they] assist us to appreciate the nature or character of the receipt upon which tax is claimed. If the parties make an amicable arrangement according to their own notions of what is fair or their own view of their legal rights, we are concerned merely to appreciate what their bargain or settlement was. If the principal really means to compensate the selling agent for a sudden ' dismissal ' or more properly a sudden determination of the agency it is only in very exceptional circumstances that anything is to be gained by considering whether the agent would have enforced a claim for damages and whether he could thereby have obtained the same amount. I see nothing in the facts of the present case to suggest that the large sums now in question were handed over to the assesseees upon the footing that there was no real liability. The principals may have been generous and wisely generous in dealing ,with their obligations but talk of ' ex gratia payment ' is singularly unimpressive in this case. I should be very much astonished to be told, and I should in any case require from the Commissioner a clear finding based upon proper evidence before I would accept it; that the agency of the assesseees

with their establishments all over India and elsewhere could be revoked suddenly without the principals becoming liable to indemnify their agents in respect of any obligations incurred by them in connexion with the discharge of the agency. Assuming that in English law there is no general doctrine that agents are entitled to notice before the agency is terminated by the principal, yet this rule is subject to exception arising from the particular circumstances of the case: and in India the matter has been dealt with by the Contract Act. Section 206 lays down:

Reasonable notice must be given of such revocation or renunciation: otherwise the damage thereby resulting to the principal or the agent, as the case may be, must be made good to the one by the other.

10. If the phrase ' such revocation or renunciation ' is to be taken as referring back to Section 205 I confess that I find no meaning in the section; and it is at least arguable that what the draftsman meant to say is that when there is no express or implied contract that the agency should continue for any fixed period reasonable notice must be given of the revocation or renunciation of the agency &c.; The question of damages and the question of indemnity doubtless would overlap in the circumstances of these agencies, and in the case of the Burmah Oil Company we knew that the sum of rupees 12 lakhs was in a sense to cover work done and to be done by the assessee until the new agent could take over completely.

11. Now the Commissioner in the present case has found that the whole of the two sums here in question were received as compensation for loss of the agencies. In this I think he is right and I do not think the bargain with the Burmah Oil Company was a bargain that the assessee would agree to take a year's notice from 1st January 1923 and to accept as commission for that year the sum of Rs. 12 lakhs. Their former agency was to terminate on 31st December 1927, They were willing to make no claim for what they had done since that date and to do certain further work to facilitate the transfer of the agency, not at their own expense to be recouped with profit by commission, but at the cost of the principal without further profit to themselves. They were willing to do this and willing to accept what would otherwise have been wrongful, viz., the termination of the agency as on 31st December 1927 provided they were compensated by Rs. 12 lakhs for their loss of

this agency. I do not gather that the principals wrongfully determined either agency and then made terms as to damages: rather it would appear that it was all along intended to purchase the assessee's consent and to proceed by agreement with them. In any case I am of opinion that the Rs. 151/4 lakhs were paid as compensation for the loss of the agencies as the Commissioner has found, and on that view I think that tax is not claim-able upon any portion of this money. In *Chibbets* case [1924] 9 Tax Cases 49 at p. 61 Rowlatt, J. said:

If it was a payment in respect of the termination of their employment I do not think that is taxable. I do not think that is taxable as a profit. It seems to me that a payment to make up for the cessation for the future of annual taxable profits is not itself an annual profit at all. I do not know whether it has arisen or been discussed, and perhaps the less I say about it the better, but I should not have thought that either damages for wrongful dismissal or a payment in lieu of notice, at any rate if it was for a longish period-I will not say a payment in lieu of notice, I will say a voluntary payment in respect of breaking an agreement which had some time to run would be taxable profits. But at any rate it does seem to me that compensation for loss of an employment which need not continue, but which was likely to continue, is not an annual profit within the scope of the Income-tax Act, at all.

12. Under the Indian Act I think that having regard to the express provisions made by Clause 7, Sub-section 3, Section 4, and to the fact that this case does not in my opinion come within that exemption, the circumstance that the receipt is casual or nonrecurring does not ground any claim to resist the tax. But if A has a favourable contract of service for ten years at a salary of 500 per annum more than any other employer would give him, and if at the end of the first year he is given as damages for wrongful dismissal a sum which is equal to the purchase price of an annuity of 500 for nine years that sum in my opinion is not income. It 'represents' in a sense what would have been income for nine years, but it is the capitalized value of such income and it may at once be invested to produce a smaller annual income which may continue and suffer income-tax for ever. The case is not in principle different from the *Glenboig* case [1926] Tax Cases 427, where it was held that compensation paid to a lessee of mineral rights for the abandonment of his right to work the minerals was a capital receipt; and Lord Buckmaster's observation is very

pertinent to 'wrongful dismissal' cases of all kinds:

There is no relation 'between the measure that is used for the purpose of calculating a particular result and the quality of the figure that is arrived at by means of the application of that test.

13. No doubt cases like the present where the assesseees had no contract for a fixed term of years may present features which render this line of reasoning less convincing. When a clerk is given three months wages 'in lieu of notice' he may be given this by virtue of a custom or express contract entitling him to the money as and by way of wages (though he does no work for it) or the reference to wages may be only a measure for the computation of damages which are at large. Such cases raise more than one difficulty which the facts of the case before us do not present at all. Compensation for loss of these agencies is a receipt in respect of a capital asset in the nature of goodwill. Just as the purchase price of a goodwill may be measured by the average profits for a comparatively short period where the element of goodwill is not a very potent factor in inducing further business, so the measure of the compensation for loss of these agencies is not the test of its character as between capital and income. But in any view I see no facts and no findings of facts upon which it can in this case be held that the compensation was in substance or in form a mere payment in advance of earnings of the assesseees over a period so short as to suggest that the receipt was income. The phrase in the letter of 2nd February 1928 'in lieu of commission for 1928' has reference merely to the fact that for 1928 the terms of the old agency were no longer to hold good, because the bargain as to compensation was upon a condition which involved that all expenses in the interim should be charged to the principals although the assesseees would facilitate the transfer of the agency by doing certain work without making further profit.

14. In my opinion the first of the three questions stated to us should be answered in favour of the assesseees and they should have their costs of the reference.

C.C. Ghose, J.

15. I agree.

Buckland, J.

16. I agree.

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