A

COMMISSIONER OF INCOME-TAX, ASSAM ETC.

v.

B

THE PANBARI TEA CO. LTD.

April 19, 1965

[K. SUBBA RAO, J. C. SHAH AND S. M. SIKRI, JJ.]

C *Indian Income-tax Act* (11 *of* 1922)—*"Premium" and "rent"—Distinction—Premium paid in instalments—Whether capital gains or revenue receipts.*

The assessee leased out its tea estates for a period of ten years in consideration of a sum as and by way of premium and an annual rent to be paid by the lessor to the assessee. As premium a part of the sum was paid at the time of the execution of the lease and the balance was spread over in ten annual instalments; and the annual D rent was payable in monthly instalments. The annual instalment paid as premium was taxed by the Income Tax authorities as revenue receipt of the assessee. On reference, the High Court held it to be capital gains. In appeal by certificate.

HELD: The annual instalment paid as premium was capital gains.

E When the interest of the lessor is parted for a price the price paid is premium or *salami*. But the periodical payments made for the continuous enjoyment of the benefits under the lease are in the nature of rent. The former is a capital income and the latter a revenue receipt. There may be circumstances where the parties may camouflage the real nature of the transaction by using clever phraseology. In some cases, the so-called premium is in fact advance rent and in others F rent is a deferred price. It is not the form but the substance of the transaction that matters. The nomenclature used may not be decisive or conclusive but it helps the court, having regard to the other circumstances, to ascertain the intention of the parties. Premium can be paid in a single payment or by instalments. The real test is whether the said amount paid in a lump sum or in instalments is the consideration paid by the tenant for being let into possession. G [813 H; 814 E-G]

Raja Bahadur Kamakshya Narain Singh of Ramgarh v. *Commissioner of Income-tax, Bihar and Orissa*, (1943) 11 I.T.R. 513, *Member for the Board of Agriculture Income-tax Assam* v. *Sindhurani Chaudhurani*, (1957) 32 I.T.R. 169, and *Chintamani Saran Nath Sah Deo* v. *Commissioner of Income-tax, Bihar and Orissa*, (1961)41 I.T.R. 506, applied.

H The parties, who were businessmen well-versed in their trade, must be assumed to have known the difference between the two expressions "premium" and "rent", and they had designedly used those two expressions to connote two different payments. The annual rent fixed was a considerable sum of Rs. 54,500/- and the premium, when spread over 10 years would work out to Rs. 22,500/- a year. There was no reason, therefore, to assume that the parties camouflaged their real intention and fixed a part of the rent in the shape of premium. The

mere fact that the premium was made payable in instalments could not obviously be decisive of the question, for that might have been to accommodate the lessee. [815 B, C] A

The construction based on the clause in the lease deed that on the default in the payments of the instalments of the premium or rent, the lessor shall be entitled to recover the balance of the unpaid premium and not the entire balance of the premium, really ignores the main terms of the lease. In the context of the other clauses, this clause could not be so construed as to override or come into conflict with the main terms of the lease deed. [815 H, 816 B] B

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 150 of 1964.

Appeal from the judgment and order dated March 22, 1960, of the Assam High Court in Income-tax Reference No. 7 of 1959. C

N. D. Karkhanis and *R. N. Sachthey*, for the appellant. *Sampat Ayyangar* and *J. P. Goyal*, for the *respondent*.

The Judgment of the Court was delivered by

Subba Rao, J. By a registered lease deed dated March 31, 1950, the assessee-company, respondent herein, leased out two tea estates named "Panbari Tea Estate" and "Barchola Tea Estate", along with machinery and buildings owned and held by it, in Darrang, in the State of Assam, to a firm named Messrs. Hiralal Ramdas for a period of ten years commencing from January 1, 1950. The lease was executed in consideration of a sum of Rs. 2,25,000/- as and by way of premium and an annual rent of Rs. 54,000/- to be paid by the lessee to the lessor. The premium was made payable as follows: Rs. 45,000/- to be paid in one lump sum at the time of the execution of the lease deed and the balance of Rs. 1,80,000/- in 16 half yearly instalments of Rs. 11,250/- on or before January 31 and July 31 of each year. The annual rent of Rs. 54,000/- was payable as follows: Rs. 1,000/- per month to be paid on or before the last day of each month, making in all Rs. 12,000/- per year, and the balance of Rs. 42,000/- on or before December 31 of each year. On February 25, 1957, for the assessment year 1952-53, the Income-tax Officer made the assessment treating the instalment of Rs. 11,250/- paid towards the premium in the relevant accounting year as a revenue receipt of the assessee. On appeal, the Appellate Assistant Commissioner confirmed the order of the Income-tax Officer. On further appeal, the Income-tax Appellate Tribunal also held that the premium was really the rent payable under the lease deed and, therefore, it was chargeable to income-tax. At the instance of the assessee, the Tribunal referred the following question to the High Court under s. 66(1) of the Income-tax Act, 1922, herein after called the Act: D E F G H

> "Whether on the facts and in the circumstances of the case and upon the construction of the terms of the lease, dated 31st March 1950, the sum of Rs. 11,250/- received by the assessee during the year of account is revenue or capital receipt".

A The High Court held that the said sum of Rs. 11,250/- received by the assessee during the year of account was a capital receipt and answered the question accordingly. On a certificate issued by the High Court, this appeal has been filed by the Revenue in this Court.

B The short question that arises in this appeal is whether the amount described as premium in the lease deed is really rent and, therefore, a revenue receipt. Before we look at the lease deed it will be convenient to notice briefly the law pertaining to the concept of premium, which is also described as *salami*.

C The distinction between premium and rent was brought out by the Judicial Committee in *Raja Bahadur Kamakshya Narain Singh of Ramgarh* v. *Commissioner of Income-tax, Bihar & Orissa* (1) thus:

> "It (salami) is a single payment made for the acquisition of
> D the right of the lessee to enjoy the benefits granted to them by the lease. That general right may properly be regarded as a capital asset, and the money paid to purchase it may properly be held to be a payment on capital account. But the royalties are on a different footing".

E

It is true that in that case the leases were granted for 999 years; but, though it was one of the circumstances, it was not a decisive factor in the Judicial Committee coming to the conclusion that the salami paid under the leases was a capital asset. This Court in *Member for the Board of Agriculture Income-tax, Assam* v. *Sindhurani Chaudhurani* (2) defined "salami" as follows:

F

> "The indicia of *salami* are (1) its single non-recurring character and (2) payment prior to the creation of the tenancy. It is the consideration paid by the tenant for being let into possession and can be neither rent nor
> G revenue but is a capital receipt in the hands of the landlord."

It is true that in that case the payment was paid in a single lump sum, but that was not a conclusive test, for salami can be paid in a single payment or by instalments. The real test is whether the
H said amount paid in a lump sum or in instalments is the consideration paid by the tenant for being let into possession. This Court again in *Chintamani Saran Nath Sah Deo* v. *Commissioner of Income-tax, Bihar & Orissa*(1) considered all the relevant decisions on the subject in the context of licences granted to the assessee to

(1) [1943] 11 I.T R. 513, 519.

(2) [1957] 32 I.T.R. 169.

prospect for bauxite in some cases for 6 months and in others for a year or two and observed: A

> "The definition of *salami* was a general one, in that it was a consideration paid by a tenant for being let into possession for the purpose of creating a new tenancy."

Applying that test this Court held in that case that under the said licences there was a grant of a right to a portion of the capital of the licensor in the shape of a general right to the capital asset. B

In view of these three decisions it is not necessary to multiply citations.

C

Under s. 105 of the Transfer of Property Act, a lease of immovable property is a transfer of a right to enjoy the property made for a certain time, express or implied or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, D who accepts the transfer on such terms. The transferor is called the lessor, the transferee is called the lessee, the price is called the premium, and the money, share service or other thing to be so rendered is called the rent. The section, therefore, brings out the distinction between a price paid for a transfer of a right to enjoy the property and the rent to be paid periodically to the lessor. E When the interest of the lessor is parted with for a price, the price paid is premium or *salami*. But the periodical payments made for the continuous enjoyment of the benefits under the lease are in the nature of rent. The former is a capital income and the latter a revenue receipt. There may be circumstances where the parties may camouflage the real nature of transaction by using clever F phraseology. In some cases, the so-called premium is in fact advance rent and in others rent is deferred price. It is not the form but the substance of the transaction that matters. The nomenclature used may not be decisive or conclusive but it helps the Court, having regard to the other circumstances, to ascertain the intention of the parties. G

Bearing the said principles in mind let us scrutinize the lease deed dated March 31, 1950. Under that document interest in two large tea estates comprising 320 acres and 305 acres respectively under tea, along with the bungalows, factory buildings, houses, godowns, cooly lines and other erections and structures, was parted H by the lessor to the lessee for a period of 10 years; and during that period the lessee could enjoy the said tea estates in the manner prescribed in the document. Under the document, therefore, there was a transfer of substantive interest of the lessor in the estates to the lessee and a conferment of a right on the lessee to use the said estates by exploiting the same. Under cl. 4 of the lease deed for the transfer of the right a premium of Rs. 2,25,000/- had to be

paid to the lessor and for using the estates the lessee had to pay an annual rent of Rs. 54,000/-. Both the premium and the rent were payable in instalments in the manner provided in the document. The parties were businessmen presumably well-versed in the working of tea estates. They must be assumed to have known the difference between the two expressions "premium" and "rent"; and they had designedly used those two expressions to connote two different payments. The annual rent fixed was a considerable sum of Rs. 54,000/- and the premium, when spread over 10 years, would work out to Rs. 22,500/- a year. There is no reason, therefore, to assume that the parties camouflaged their real intention and fixed a part of the rent in the shape of premium. The mere fact that the premium was made payable in instalments cannot obviously be decisive of the question, for that might have been to accommodate the lessee. Nor is cl. 8 of the lease deed, on which strong reliance is placed by the learned counsel for the Revenue, a pointer to the contrary. It reads:

> "(1) If any of the aforesaid instalments towards the premium or annual rent shall remain unpaid for two months after becoming payable (whether formally demanded or not) or if the lessee shall make default in payment to the Lessor any other sum or any part thereof in due dates or in observing or performing any of the covenants, conditions or stipulations hereinbefore contained and on the part of the Lessee to be paid, observed and performed or if the Lessee's firm is dissolved except for reconstruction or if any of the partners of the Lessee is adjudicated insolvent then and in any such cases it shall be lawful for the Lessor immediately or at any time or times thereafter upon the demised Tea Estates and premises or any part thereof in the name of the whole to re-enter and thereupon this demise shall absolutely determine but without prejudice to the rights of the Lessor to damages or compensation in respect of any breach of Lessee covenants herein contained and all other rights and remedies including the right to recover the balance of the instalment unpaid premium or rent payable in that particular year."

The argument is that in the case of default contemplated in this clause it shall be lawful for the lessor to re-enter and in that event in terms of cl. 8 he will be entitled only to recover the balance of the instalment of unpaid premium and not the entire balance of the premium. This construction, though it appears to be plausible at first sight, really ignores the main terms of the lease. The default clause is pressed into service to destroy the main term of the lease. Under cl. 1 of the lease deed the sum of Rs. 2,25,000/- is the consideration by way of premium to be paid by the lessee to the lessor. Under cl. 4 thereof the said entire premium has to be

paid in instalments; under cl. 8 the lessor has the option to terminate the lease and re-enter the premises in the circumstances mentioned therein without prejudice to all his rights under the document. One of his rights is to recover the premium in instalments. The fact that one of the rights saved is his right to recover the balance of the instalment of unpaid premium cannot possibly deprive him of all his other rights which are also expressly saved thereunder. The drafting of the clause is not artistic and is rather confused; but in the context of the other clauses it cannot be so construed as to override, or come into conflict with, the main terms of the lease deed.

Thirdly, it was contended that the income the lessor was getting under the lease after 1950, i.e., after the execution of the lease deed, viz., the total of the instalments of premium and rent, was not higher than the profits he was getting before the lease and that was an indication that what was rent really was split up into premium and rent for ulterior purposes. This argument is based upon the following data collected from the published accounts of the assessee-company:

Year ended (1)	Profit (2)	Depreciation (3)	Net Profit (4)	Divided (tax free) (5)
	Rs.	Rs.	Rs.	%
31st March 1947	60,186	8,665	51,521	9
31st March 1948	33,118	7,872	23,246	9
31st March 1949	31,581	7,475	24,106	6
31st March 1950	47,734	17,868	29,866	12
31st March 1951	71,888	17,726	54,162	6
31st March 1952	33,213	15,527	17,686	6
31st March 1953	69,550	15,410	54,140	6

In the accounts of the year to 31st March 1952 there are the following three items of expenditure:—

	Rs.
Transit charges	10,605
Legal Expenses	7,518
Gratuity to Managing Director	10,000
	28,123

Before comparing the figures given for the two periods, i.e., the period before March 1950 and the period thereafter, it is necessary to add back the said three items of expenditure totalling

A Rs. 28,123/- to the net profit of the year ended with 31st March, 1952; if they were added, instead of Rs. 17,686/-, the profit would be Rs. 45,809/-. A comparative study of the said figures discloses a higher return in the second period than during the earlier period. But an attempt is made to show that the figures of the later period include other items and if they are deducted the net profit would be B comparable with that in the earlier period, but there is no agreed data for this attempt and it is not possible on the material placed before us tc scrutinize the figures. In the absence of the relevant material it is not possible to accept the argument built upon the said figures.

C The result is that there is no material placed before us, either direct or circumstantial, to displace the description given in the lease deed to the said amounts as premium and to hold that they are not in fact premium but only rent. Indeed, the circumstances mentioned supra confirm the said description.

D In the result we hold that the High Court has given a correct answer to the question submitted to it by the Income-tax Appellate Tribunal. The appeal is dismissed with costs.

Appeal dismissed.