REFERENCE CIVIL

Before Inder Dev Dua and Daya Krishan Mahajan, JJ.

THE COMMISSIONER OF INCOME-TAX,—*Applicant.*

versus

M/s. ALPS THEATRE,—*Respondent.*

Income-Tax Reference No. 28 of 1962.

Income-tax Act (XI of 1922)—S. 10 (2) (vi)—"Building"— Meaning of—Whether includes land on which it stands—Cost of such land—Whether entitled to depreciation.

1964

October, 28th.

Held, that the term 'building' is not always limited to the structure itself, it sometimes includes the land on which the building stands and the land within the enclosure belonging to the building and appropriate to its use. In one context, the 'building' may include not only the land underneath it but the land which is necessary for its enjoyment; in the other context, it may not include the land which adjoins it but may include the land which is underneath it; and still in the other context it may not even include the land which is underneath it.

Held, that the context in which the word 'building' is used in section 10(2) (vi) of the Indian Income-Tax Act is that it includes the land underneath it. In the section "building" is placed at par with machinery and furniture and is treated as a unit. Depreciation is on building as a unit and not on parts of a building. What is integral part of a building would be building whether it is bricks, or wood or steel or land. For purposes of depreciation one cannot split up the building into what is building material and land. As the building is treated as a unit for the purposes of depreciation or repair, there is no warrant in the Act to split that unit for the purposes of section 10. Hence the cost of the land is entitled to depreciation along with the cost of the building standing thereon.

Case referred under section 66 (1) of the the Income-Tax Act, 1922, by the Income-Tax Appellate Tribunal, Delhi Bench for decision of the following question of law involved in the case:—

> *"Whether the cost of land is entitled to depreciation under the schedule to the Income-Tax Act along with the cost of the building standing thereon?"*

D. N. AWASTHY AND H. R. MAHAJAN, ADVOCATES, for the Appellant

DHARAM CHAND, ADVOCATE, for the Respondent.

JUDGMENT

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MAHAJAN, J.—This is a reference under section 66(1) of the Indian Income-tax Act—hereinfter referred to as the Act. The Income-tax Appellate Tribunal Delhi Bench has referred the following question of law for our opinion:—

> "Whether the cost of land is entitled to depreciation under the schedule to the Income-tax Act along with the cost of the building standing thereon?"

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The Income-tax Officer, in his original assessment, made on the 27th May, 1957, allowed deduction of Rs. 29,925 for admissible depreciation. Later on, the Income-tax Officer came to the conclusion that the depreciation had been allowed in excess. He accordingly took proceedings under section 34 of the Act and in the re-assessment proceedings reduced the deductions from Rs. 29,925 to Rs. 25,049. The sole ground on which this was done was that the cost of the land underneath the building could not be treated as part of the building for purposes of depreciation. The assessee—Messrs. Alps Theatre, Rajpura—went up in appeal to the Appellate Assistant Commissioner against the order of the Income-tax Officer. The Appellate Assistant Commissioner rejected the appeal and affirmed the order of the Income-tax Officer. The relevant part of his order reads thus:—

> "Yogi Chanan Ram, argued that a building cannot be separated from the land on which it stands for calculation of depreciation. *In Mair* v. *William* (1) a building has been defined to mean a block of bricks or stone work covered by a roof. This definition does not include the land on which the building stands. If a building includes the cost of the land then even if the building is dismantled and only the land used, an assessee can claim depreciation on the land alone, on the ground that it forms a part of the building. This would be an absurd claim. According to law, depreciation is admissible on a building used for business purposes. The building is not inclusive of the land on which it stands and at least the Act itself does not say so."

The assessee preferred an appeal to the Income-tax appellate Tribunal Delhi Bench. The Tribunal set aside the order of the Income-tax Officer passed under section 34 of the Act and restored the previous order dated the 27th May, 1957. The reasons given by the Tribunal for taking a contrary view may best be stated in their words:—

> "You cannot conceive of a building without the land beneath it. It is not possible to conceive of

(1) (1892) I.Q.B. 264.

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a building without a bottom. What section 10(2) (vi) of the Act says is that depreciation will be allowed on the building. The word 'building' itself connotes the land upon which something has been constructed. It was, therefore, wrong on the part of the authorities below to exclude the value of the land upon which some construction was made. The true meaning of the word 'building' means the land upon which some construction has been made. The two must necessarily go together."

The Department is dissatisfied with the order of the Tribunal and hence the present reference.

The problem that the question poses is by no means free from difficulty. Before dealing with the arguments of the counsel for the Department as well as the assessee, it will be proper to advert to certain provisions of the Act.

The word 'building' is not defined in the Act. Section 9 of the Act lays down that "the tax shall be payable by an assessee under the head 'income from property' in respect of *bona fide* annual value of property consisting of any buildings or lands appurtenant thereto of which he is the owner,". It will be obvious from this that building is treated as a unit apart from the land. Can there be a building without there being land on which it stands ? Thus it appears that the land underneath the building is treated as building for purposes of the Act and it is only the land, which is not under it but is appurtenant to it, which is treated separately.

Section 10 of the Act allows certain exemptions from tax paid on business. The exemptions are set out in sub-section (2) of section 10. Clauses (i) and (ii) of Sub-section (2) of Section 10 use the word 'premises', a term of wider import, which will include both the building as well as land. Clause (iv) deals with the allowance of insurance premium against risk of damage or destruction of buildings, machinery, plant, furniture, stocks or stores, used for the purposes of the business etc. Clause (v) makes a provision for allowance in respect of current repairs to such buildings, machinery, plant or furniture, etc. Clause (vi)

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provides for depreciation of such building, machinery, etc. There is a provision in this clause with regard to the new buildings erected after the 31st March, 1945, and it is provided that a further sum is permited to be deducted towards depreciation and the rates of deduction are specified in sub-clauses (a) and (b) of clause (vi) so far as buildings are concerned. Clause (vi-b) also allows deductions for and in respect of buildings newly erected, etc. It is not necessary to notice other clauses of this section. Suffice it to say that building is put at par with machinery, plant or furniture. In other words, building is again treated as a unit, like machinery or furniture.

This brings me to the consideration of the respective arguments.

The argument on behalf of the Department is that the land is a capital investment unless it is taken on lease. Where it is taken on lease, the lease money is a legitimate deduction which the Act allows, but where it is purchased it is in the nature of capital investment. The terms 'repair' or 'depreciation' seem incongruous so far as the land is concerned. Land may increase or decrease in value, but that will be an addition to or loss of capital. Merely because a building is erected on land would not make it an item on which depreciation can be allowed. If land was left as land, there would be no question of depreciation. It is contended, therefore, that the Income-tax Officer was right in treating the land apart from the building and not allowing depreciation on its cost.

The learned counsel for the assessee, on the other hand, contends that land is as much integral part of building as the doors, bricks, roof and other parts of the building. One cannot conceive of a building without land which is immediately underneath it. When one sells the building one sells along with it land, otherwise what one sells would not be building, but building material. His contention, therefore, is that the word 'building' necessarily implies land on which it is built and thus land would be included in the word 'building' for depreciation is allowed on building and not on building material. He relies on the distinction made between land and building in section 9 of the Act as well as on the decision of the House of Lords

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in the *Corporation of the City of Victoria* v. *Bishop of Vancouver Island* (2). In this case every building set apart and in use for the public worship of God was exempt from the municipal rates and taxes whereas the land as such was liable to rates and taxes under that Act. The question that fell for determination before the House of Lords was, to state in the words of Lord Atkinson, as follows:—

> "The question for decision is, are the lands under the buildings set apart and used for the public worship of God dealt with in sub-section 1 of this section also impliedly put outside the reach of those taxing powers ?"

While answering this question, Lord Atkinson observed as follows:—

> "If one takes the first sub-section of this section 197 and asks oneself what idea do those words in their ordinary grammatical meaning convey to the mind, the answer must be, a building in which the public worship of God can be carried on. The words 'in actual use for' necessarily convey that, and therefore, that everything needed to have that worship carried on is comprised in the description of the edifice in which it is to be carried on.
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> The thing most necessary for the use of the cathedral as a place for public worship is that the congregation which frequents it should be able to stand or kneel upon the ground embraced within its walls and forming the floor of it, or sit upon chairs resting upon that floor. The use of the floor is infinitely more essential than the use of a roof. In fact, it is impossible to conceive the public worship of God being carried on in a building without the use of the land which it embraces within its walls, as it is impossible to conceive walls existing without the support, direct or indirect, of the soil of the earth. The

(2) (1921) 1 A.C. 384.

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conception of such things is not the less impossible because the Legislature has by statute made the attempt fancifully to divide for the purpose of taxation concrete entities notionally into sections or portions which are presumably mutually exclusive and independent of each other. Their attempt will be abortive unless the language used be clear and plain. Should it not be so, one must judge by the meaning of the ordinary language used what is the nature of the thing to be dealt with as it is described in that language.

To hold that the ground upon which the cathedral stands is exempt from taxation though not by express words is only to do what to avoid gross absurdity must be done in the case of the buildings mentioned in sub-sections 3, 6 and 7 of this very section 197. In the case of a building set apart and solely used as a hospital, the land adjoining thereto and actually used therewith, not exceeding 20 acres in the case of a public hospital and 3 acres in the case of a private hospital, is expressly exempted from taxation, but the ground upon which the hospital stands is not expressly exempted, though it necessarily contributes more to the service of suffering mankind than does the adjoining land. The only rational explanation of that provision is that the latter lands are impliedly exempted, because the word 'building' as used in ordinary language, comprises not only the fabric of the building, but the land upon which it stands. The same considerations apply to the case of an orphanage mentioned in sub-section 6 and to the horticultural societies mentioned in sub-section 7.

If in these sub-sections the ordinary and natural meaning be given to the word 'building' as including fabric and the ground on which it stands, the legislation is rational. If to that word be given the meaning of fabric without the ground upon which it stands the results are absurd. But if to make sense, this comprehensive meaning be given to the word 'building' as

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used in sub-sections 3, 6 and 7 it would be contrary to every sound principle of construction to create an antagonism and inconsistency between these sub-sections and the first sub-section by not giving to the word 'building' in the first the same comprehensive meaning it bears in the others, especially as the purposes for which the building is to be used go strongly to show that it should get the comprehensive meaning, and there is no provision to show it should get the restricted one. Taking s. 197 by itself, their Lordships are clearly of opinion that, if rationally and justly construed, the word 'building' must receive the same meaning in sub-sections 1, 3, 6 and 7, that is its natural and ordinary meaning, including the fabric of which it is composed, the ground upon which its walls stand, and the ground embraced within those walls."

As observed in Corpus Juris Secundum, Vol. 12, at page 380 the term 'building' is not always limited to the structure itself, it sometimes includes the land on which the building stands, and the land within the enclosure belonging to the building and appropriate to its use. It is, therefore, obvious that the word 'building' will have to be construed in the context of the statute in which it is used. In one context, as observed above, the 'building' may include not only the land underneath it but the land which is necessary for its enjoyment; in the other context, it may not include the land which adjoins it but may include the land which is underneath it; and still in the other context it may not even include the land which is underneath it. It is this problem which has to be solved in the present case.

In what context is the word 'building' used in section 10(2)(vi) ? As I have already said, 'building' is placed at par with machinery and furniture and is treated as a unit. Depreciation is on building as a unit and not on parts of a building. What is integral part of a building would be building whether it is bricks, or wood or steel or land.

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For purposes of depreciation one cannot split up the building into what is building material and land. If the Legislature wanted to execlude land from the building for purposes of depreciation, it could have said so. As the Tribunal rightly observed, "one cannot conceive of a building without the land on which it stands." When a building is sold, it is sold along with the land unless the land is specifically excluded from sale. The observations of Lord Atkinson in *Corporation of the City of Victoria's case* (2) do support the view I have taken of the matter.

Moreover, depreciation is allowed on the capital. The capital here is a unit-building. If later on it is sold and it fetches more than its written down value the surplus is liable to tax, (see in this connection Section 10(2)(vii) Proviso). We are, therefore, clearly of the view that building would include the land underneath it and that the decision of the Tribunal is correct. The argument on behalf of the Department has already been noticed. If land is capital investment, surely the building on it is as much capital investment as the land. As already noticed, the depreciation is on capital. Thus this consideration will not, in any manner, advance the argument of the Department. The crux of the matter is that the building is treated as a unit for purposes of depreciation or repair, and there is no warrant in the Act which would permit us to split the unit for the purposes of section 10. At best this is a case where two equally plausible interpretations are possible. In this situation we must adopt the one that favours the assessee. The Rule in such cases is well settled, namely that if two interpretations are possible on a taxing Statute, the one favouring the assessee should be adopted. See *Commissioner of Income Tax* v. *C. S. Sastri* (3).

After giving the matter our careful consideration we are definitely of the view that the Tribunal was right in its approach. The answer to the question referred to us has, therefore, to be in the affirmative.

As the matter was not free from difficulty, we leave the parties to bear their own costs.

Dua, J.

DUA J.—The question referred is by no means free from difficulty and the contentions raised on behalf of the

(3) 35 I.T. R .476.

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Revenue that land on site underneath a building is from the very nature of things not subject to depreciation, though the floor of the building on such land or site is, cannot be considered to be wholly devoid of cogency which can be brushed aside with a shrug of the shoulder. The dearth of judicial literature on this point and absence of direct precedent in a way simplifies this Court's task inasmuch as the question in that event falls to be answered only from first impression, but it also deprives this Court of a rich source of assistance which our jurisprudence values so much. Since much can be said for both points of view and the view in support of the assessee's submission has found favour with the tribunal below, which has not been shown to be clearly erroneous, the answer deserves to be in the affirmative.

K.S.K.