

Commissioner of Income Tax

Vs

Narang Dairy Products.

Civil Appeal No. 388 of 1978

(B. P. Jeevan Reddy, K. S. Paripoornan JJ)

28.02.1996

JUDGMENT

K. S. PARIPOORNAN J.

The CIT, Lucknow (the Revenue) having obtained special leave of this Court in Special Leave Petition (Civil) No. 3204 of 1977 by order dt. 21st Feb., 1978, has filed the civil appeal against the order of Allahabad High Court dt. 1st Aug., 1977, rendered in IT Appln. No. 194 of 1977 rejecting the application filed by the Revenue under s. 256(2) of the IT Act (hereinafter referred to as the Act). The Revenue required the Tribunal, Allahabad Bench, to refer the following question of law under s. 256(1) of the Act for the decision of the High Court :

"Whether the Tribunal was in law justified in holding that the amendment order made by the ITO was not sustainable to the extent to which it purported to withdraw development rebate admissible to the assessee in respect of that part of the machinery/plant which was the subject matter of the hiring agreement dt. 27th Aug., 1969."

The Tribunal rejected the said application by order dt. 20th Oct., 1976. It is, thereafter the Revenue filed the application under s. 256(2) of the Act before the High Court, which was rejected by order dt. 1st Aug., 1977.

2. The facts of this case are in a narrow compass. The respondent- assessee is a registered firm. It carried on the business of manufacture of "milk powder". We are concerned herein with the asst. yr. 1965-66. For the said year, the ITO by order dt. 29th June, 1968, allowed development rebate for the entire machinery and plant owned by the assessee and used for the said business in the sum of Rs. 1,00,093. A part of the machinery was subsequently sold. The machinery that was left entitling the assessee to the development rebate for the said year was determined at of Rs. 85,222. This machinery was let out by the assessee on 27th Aug., 1969 to M/s Hindustan Lever Ltd. for a period of three years with a provision for further renewal of the agreement or for outright purchase. In the circumstances, the ITO, by an amendment order dt. 30th March, 1970, withdrew the development rebate of Rs. 1,00,093. The appeal filed by the assessee was dismissed by the AAC. In further appeal before the Tribunal, it was contended that there was no "sale" or "transfer" within the meaning of s. 34(3)(b) of the Act, permitting withdrawal of the development rebate of Rs. 1,00,093, granted earlier and in this view the amendment order passed by the ITO was improper and unjustified. The Tribunal followed its earlier decision rendered for the asst. yr. 1970-71 and held that no transfer was involved by the lease agreement and so s. 34(3)(b) of the Act was not attracted. The appeal filed by the assessee was allowed. Thereafter the Revenue required the Tribunal in RA

No. 131/1976-77, to refer the question of law formulated hereinabove for the decision of the High Court. The Tribunal declined the request of the Revenue and the application filed by the Revenue before the High Court also met with the same fate. It necessitated the Revenue to approach this Court by special leave. After obtaining special leave in SLP(C) No. 3204/1977, the above appeal has been filed.

3. We heard counsel. The original assessment order for the year 1965- 66 was rendered on 29th June, 1968. The amendment order withdrawing the development rebate was passed by the ITO on 30th June, 1970. In view of the pendency of the matter for over two decades we intimated counsel on both sides that we propose to finally adjudicate the matter and in that behalf, we withdraw the entire matter from the High Court, to this Court.

4. It is common ground that for the year 1965-66 the assessee was allowed development rebate for the entire machinery and plant owned and used by it for the purpose of business in the sum of Rs. 1,00,093. Later, a part of the machinery was sold. The assessee became entitled to development rebate only in the sum of Rs. 85,222. It is common ground that the machinery was let out by the assessee on 27th Aug., 1969 to M/s Hindustan Lever Ltd. for a period of three years with the provision for further renewal of the agreement or for outright purchase. The sole question that arises for consideration is, whether in the circumstances, s. 34(3)(b) of the IT Act is attracted enabling the ITO to pass the amendment order as he did, dt. 30th March, 1970, withdrawing the development rebate of Rs. 1,00,093 ?

5. Dr. Gauri Shankar, senior counsel appearing for the appellant, submitted that by entering into the lease transaction the assessee has "otherwise transferred" the machinery or plant before the expiry of eight years from the end of the previous year in which it was acquired and installed and so the allowance made under s. 33 of the Act, in respect of the machinery or plant should be deemed to have been wrongly made for the purpose of the Act. Counsel for the assessee, Smt. S. Janani, submitted that s. 34(3)(b) of the Act should be read along with the definition contained in s. 2(47) of the Act, and so read, this is not a case of any "sale" or "transfer otherwise" extinguishing the rights of the assessee in the machinery or plant.

6. It will be useful to bear in mind the relevant statutory provisions [s. 2(47), s. 33 and s. 34(3)(b)] applicable to the instant case :

"Sec. 2(47) - "transfer", in relation to a capital asset, includes, -

(i) the sale, exchange or relinquishment of the asset; or

(ii) the extinguishment of any right therein; or

(iii) the compulsory acquisition thereof under law; or

(iv) in a case where the asset is converted by the owner thereof into, or is treated by him as, stock-in-trade of a business carried on by him, such conversion or treatment; or

(v) any transaction involving the allowing of the possession of any immovable property to be taken or retained in part performance of a contract of the nature referred to in s. 53A of the Transfer of Property Act, 1882 (4 of 1882); or

(vi) any transaction (whether by way of becoming a member of, or acquiring shares in, a co-operative society, company or other association of persons or by way of any agreement or any arrangement or in any other manner whatsoever) which has the effect of transferring, or enabling the enjoyment of, any immovable property.

Explanation. - For the purposes of sub-cl. (v) and (vi), "immovable property" shall have the same meaning as in cl. (d) of s. 269UA;"

"33(1)(a) In respect of a new ship or new machinery or plant (other than office appliances or road transport vehicles) which is owned by the assessee and is wholly used for the purposes of the business carried on by him, there shall, in accordance with and subject to the provisions of this section and of s. 34, be allowed a deduction, in respect of the previous year in which the ship was acquired or the machinery or plant was installed or, if the ship, machinery or plant is first put to use in the immediately succeeding previous year, then, in respect of that previous year, a sum by way of development rebate as specified in cl. (b)."

"34(3)(b) - If any ship, machinery or plant is sold or otherwise transferred by the assessee to any person at any time before the expiry of eight years from the end of the previous year in which it was acquired or installed, any allowance made under s. 33 or under the corresponding provisions of the Indian IT Act, 1922 (11 of 1922), in respect of that ship, machinery or plant shall be deemed to have been wrongly made for the purposes of this Act, and the provisions of sub- s. (5) of s. 155 shall apply accordingly :

Provided that this clause shall not apply -

(i) where the ship has been acquired or the machinery or plant has been installed before the 1st day of January, 1958; or

(ii) where the ship, machinery or plant is sold or otherwise transferred by the assessee to the Government, a local authority, a corporation established by a Central, State or Provincial Act or a Government company as defined in s. 617 of the Companies Act, 1956 (1 of 1956); or

(iii) where the sale or transfer of the ship, machinery or plant is made in connection with the amalgamation or succession, referred to in sub-s. (3) or sub-s. (4) of s. 33."

7. In this case, the machinery or plant was not sold. Admittedly, the machinery was let out by the assessee to M/s Hindustan Lever Ltd. on 27th Aug., 1969, within a period of eight years from the end of the previous year in which it was acquired. The only question is whether it can be said that the machinery or plant was "otherwise transferred" by the assessee to any person. Under s. 33(1)(a) the development rebate is allowed in respect of the new machinery and plant which is owned by the assessee and is wholly used for the purpose of business carried on by him. When the machinery was let out by the assessee to M/s Hindustan Lever Ltd., it cannot admit of any doubt, that the said machinery or plant could not and was not used by the assessee for the purpose of business carried on by him. It is not only the ownership of the plant or machinery, but also is its exclusive user by the assessee for the purpose of his business, that is essential to enable the assessee to get the development rebate under s. 33(1)(a). In cases where an assessee disables himself from such

continued exclusive user of the plant or machinery for the purpose of his business for the specified period, the consequences specified in s. 34(3)(b) will follow, provided the machinery or plant is "otherwise transferred". It is true that there is no sale; nor is there any complete extinguishment of the right of the assessee in the machinery or plant by the grant of lease; but the exclusive possession and enjoyment of the machinery or plant by the assessee no longer exists or survives. Such right to exclusive possession and enjoyment vests in the lessee and it is a case where the machinery or plant is "otherwise transferred" to the lessee. It is a case where the machinery or plant is "otherwise transferred" by the assessee to any person before the expiry of eight years from the end of the previous year in which it was acquired. Even assuming that the transaction may not be a "transfer" as defined under s. 2(47) of the Act, in our view, the definition section is an inclusive one and does not exclude the contextual or the ordinary meaning of the word, "transfer". There are different shades of meaning to the word "transfer", viz., "to make over possession of to another", "a delivery of title or property from one person to another", "to displace from one surface to another", "removal", "hand over", "make over possession of property to another", "change", "displace", etc. The words "otherwise transferred" occurring in s. 34(3)(b) should bear an appropriate meaning, in the context of the main provision, s. 33(1)(a) of the Act. Sec. 34(3)(b) is closely linked to s. 33(1)(a) of the Act. Keeping in view the purpose, for which the relief by way of development rebate is afforded under s. 33(1)(a) of the Act, in cases where the machinery or plant is not wholly used by the assessee for the purpose of business carried on by him, for the specified period, and such user is given over to another, it can be safely stated that the machinery or plant is "otherwise transferred" by the assessee to another person. In the above view of the matter, we are of the view, that the withdrawal of the development rebate by the ITO in the amendment order dt. 30th March, 1970 by relying on s. 34(3)(b) of the Act is justified. We are broadly in agreement with the decision of the Kerala High Court reported in *Blue Bay Fisheries (P) Ltd. vs. CIT (1987) 166 ITR 1 (Ker)*, in the interpretation of the crucial words occurring in s. 34(3)(b) of the Act, "otherwise transferred". We set aside the decision of the Allahabad High Court and also of the Tribunal and answer the question formulated by the Revenue under s. 256(1) of the Act in the negative, in favour of the Revenue and against the assessee. The appeal is accordingly allowed. There shall be no order as to costs.