

Commissioner of Income-Tax

Vs

S. Balasubramanian

Civil Appeals Nos. 4048-53 of 1984

(Sujata V. Manohar, D. P. Wadhwa JJ)

24.03.1998

JUDGMENT

SMT. SUJATA V. MANOHAR J. –

The following question was referred to the High Court of Madras (see [1982] 138 ITR 815) under section 256(1) of the Income-tax Act, 1961 (page 816) :

"Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was right in holding that the provisions of section 155(5) of the Income-tax Act, 1961, are not applicable to the facts of the case and that the development rebate allowed for assessment years 1960-61 to 1965-66 cannot be withdrawn by the Income-tax Officer ?"

The assessee at the material time, was a Hindu undivided family of which one Srinivasa Iyer was the karta and his son, the respondent, was a coparcener. The joint family carried on business. For the assessment years 1960-61 to 1965-66, development rebate was allowed to the joint Hindu family on new machinery and plant installed by the joint Hindu family for the purpose of its business. On August 1, 1967, there was a partial partition of the joint family and the plant and machinery which had been the subject-matter of development rebate was allotted to the two coparceners at the written down value. After the partition, the two members sold the machinery and plant allotted to them respectively to a third party on October 1, 1967.

On coming to know of the sale within a period of eight years from the installation of the said plant and machinery, the Income-tax Officer by his letter dated February 6, 1971, proposed to withdraw the development rebate granted to the assessee on the ground that the machinery had been sold within the statutory period. It was contended on behalf of the assessee that the person to whom the development rebate had been allowed was the Hindu undivided family. The Hindu undivided family did not sell or transfer the plant or machinery and hence section 155(5) of the Income-tax Act, 1961, would not be attracted. This contention has been upheld by the Tribunal as well as by the High Court, The High Court further held that the Hindu undivided family had not merely not sold the machinery or plant itself, or transferred it, but it had also not ceased to utilise the amount credited to the reserve fund as contemplated by section 34(3). As a result, the withdrawal of the development rebate by the Income- tax Officer was he

To decide the controversy before us, it is necessary to set out the relevant provisions of sections 33, 34 and 155(5) as they stood at the relevant time :

"33. Development rebate. - (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 section 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 clause (b) ...

34. Conditions for depreciation allowance and development rebate. - ...

(3)(a) The deduction referred to in section 33 shall not be allowed unless an amount equal to seventy-five per cent. of the development rebate to be actually allowed is debited to the profit and loss account of the relevant previous year and credited to a reserve account to be utilised by the assessee during a period of eight years next following for the purposes of the business of the undertaking, other than - ...

(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 section 33 or under the corresponding provisions of the Indian Income-tax 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-section (5) of section 155 shall apply accordingly : ..."

Section 155(5) which deals with withdrawal of development rebate provides as follows :

"155. (5) Where an allowance by way of development rebate has been made wholly or partly to an assessee in respect of a ship, machinery or plant installed after the 31st day of December, 1957, in any assessment year under section 33 or under the corresponding provisions of the Indian Income-tax Act, 1922 (11 of 1922), and subsequently -

(i) at any time before the expiry of eight years from the end of the previous year in which the ship was acquired or the machinery or plant was installed, the ship, machinery or plant is sold or otherwise transferred by the assessee to any person other than the Government, a local authority, a corporation established by a Central, State or Provincial Act or a Government company as defined in section 617 of the Companies Act, 1956 (1 of 1956), or in connection with any amalgamation or succession referred to in sub-section (3) or sub-section (4) of section 33; or

(ii) at any time before the expiry of the eight years referred to in sub-section (3) of section 34, the assessee utilises the amount credited to the reserve account under clause (a) of that sub-section -

(a) for distribution by way of dividends or profits; or

(b) for remittance outside India as profits or for the creation of any asset outside India; or

(c) for any other purpose which is not a purpose of the business of the undertaking;

the development rebate originally allowed shall be deemed to have been wrongly allowed, and the Assessing Officer may, notwithstanding anything contained in this Act, recompute the total income of the assessee for the relevant previous year and make the necessary amendment; and the provisions of section 154 shall, so far as may be, apply thereto, the period of four years specified in sub-section (7) of that section being reckoned from the end of the previous year in which the sale or transfer took place or the money was so utilised."

In the present case, we are concerned with the application of section 155(5) and the withdrawal of development rebate. There are two situations in which the development rebate which was originally allowed shall be deemed to have been wrongly allowed and the Income-tax Officer will be entitled to recompute the total income of the assessee for the relevant previous years and make the necessary amendment as set out in that section. These two conditions are : (1) that at any time before the expiry of eight years from the end of the previous year in which the machinery or plant was installed, the machinery or plant is sold or otherwise transferred by the assessee as set out in that section; (2) if the assessee at any time before the expiry of eight years utilises the amount in the reserve account either for distribution by way of dividends, profits or for remittance outside India as profits or for the creation of any asset outside India or for any other purpose which is not a purpose of the business of the undert

The joint Hindu family, in the present case, effected a partial partition. As a result of that partial partition, portions of plant and machinery came to the share of each of the coparceners. These coparceners, in turn, sold the machinery to a third party. Section 155(5)(i) requires that : (1) the plant or machinery should be sold or otherwise transferred (2) the transfer should be by the assessee to any person. Here on a partial partition of the joint Hindu family, portions of plant and machinery have come to the share of two coparceners. We have to examine first, whether this amounts to a transfer of plant and machinery by the joint Hindu family to the individual coparceners. The term "transfer" is defined under section 2(47) of the Income-tax Act, 1961, in a wide manner so as to include not merely a sale or exchange, but also extinguishment of any right in the capital assets (vide capital gains). Whether in the present case the partial partition results in the extinguishment of any right of the assessee j

A similar question came up before this court and was considered by a Bench of three judges in *Malabar Fisheries Co. v. CIT* [1979] 120 ITR 49. In that case the development rebate had been granted to the partnership firm which was dissolved within a period of eight years. On the dissolution of the firm, assets were distributed between the partners. This court examined the question whether on dissolution of the partnership firm there was any transfer of assets from the partnership firm to the partners. This court held that there was no transfer of any asset from the partnership firm to its partners on dissolution of the firm. This court observed (page 54) : "On a plain reading of section 34(3)(b), it will appear clear that before the provision can be invoked or applied three conditions are required to be satisfied : (a) that the ship, machinery or plant must have been sold or otherwise transferred, (b) that such a sale or transfer must be by the assessee, and (c) that the same must be before the expiry of eight

The same reasoning would apply to partition of a Hindu joint family. In *Principles of Hindu Law*, Mulla, at page 262 (16th edition), has compared a partnership firm and a joint Hindu family firm and set out points of distinction between the two. The main distinction is that in a joint family

business no member of the family can say that he is the owner of any specific share. The essence of the joint Hindu family property is unity of ownership and community of interest. Shares of the members are not defined. However, in view of the unity of ownership and community of interest of all coparceners in the joint Hindu family business, the position on partition of the joint Hindu family business, whether it be partial or complete, is very similar in law to the position on dissolution of a partnership firm. On partition the shares of the coparceners in the joint family business become defined and their community of interest is separated. Division of assets is a matter of mutual adjustment of accounts as in the case o

In *Malabar Fisheries Co.* [1979] 120 ITR 49 (SC), there is an additional reason given for holding that section 34(3)(b) is not attracted. The court has said that the sale or transfer of assets must be by the assessee to a person. Upon dissolution, the firm ceases to exist. Then follows the making up of the accounts, distribution of assets, etc. This distribution is not done by the dissolved firm. In this sense, there is no transfer of assets by the assessee, that is to say, the dissolved firm, to any person. The same will be the position in the case of partition of a joint Hindu family when assets are divided between the coparceners.

In the present case, however, unlike *Malabar Fisheries Co.'s* case, [1979] 120 ITR 49 (SC), a further event has occurred within eight years after the partial partition of the Hindu joint family and distribution of its assets amongst the coparceners. The coparceners have sold the machinery to a third party within a period of eight years. Looking to the conditions which have been stipulated in section 34(3)(b), the sale or transfer is required to be by the assessee to a third party. In the present case since the sale is not by the joint family to the third party this condition is held as not fulfilled by the Madras High Court, although there is, in fact, a sale to a third party. In the light of the judgment in *Malabar Fisheries Co.'s* case, [1979] 120 ITR 49 (SC), the Madras High Court has, therefore, held that the reopening by the Income-tax Officer under section 155(5) of the Income-tax Act, 1961, was not in accordance with law.

The appellant, however, has drawn our attention to two recent decisions of this court where a somewhat different view has been taken of the provisions relating to development rebate. In the case of *South India Steel Rolling Mills v. CIT* [1997] 224 ITR 654, a Bench of two judges of this court examined the case where the partnership firm had obtained the benefit of development rebate under section 33(1)(a) but the partnership firm stood dissolved before the expiry of eight years on account of the death of one of the two partners, although from the next day a new partnership firm was constituted. This court said that under section 33(1)(a), the words which qualify an assessee for obtaining development rebate are, (plant and machinery) "which is owned by the assessee and is wholly used for the purposes of the business carried on by him". Therefore, the machinery must be used for a period of eight years by the assessee for the purposes of the business carried on by him. Since the assessee had ceased to carry on b

The right to recompute the total income which is given to the Income- tax Officer under section 155(5) on the ground that the development rebate originally allowed shall be deemed to have been wrongly allowed has to be exercised in accordance with the provisions of section 155(5), The circumstances under which the development rebate shall be deemed to have been wrongly allowed are set out in section 155(5) and these are : (1) that at any time before the expiry of eight years, the plant or machinery is sold or otherwise transferred by the assessee to any person. (2) The second condition is about the breach of terms relating to utilisation of the reserve account. There is no express requirement under section 155(5)(i) or section 34(3)(b) that the plant or machinery should be used for a period of eight years by the assessee wholly for the purpose of his business. However,

sections 155(5) and 34(3)(b) cannot be read in isolation ignoring section 33. In Malabar Fisheries Co.'s case [1979] 120 ITR 49 (SC), the ques

The appeals are, therefore, allowed. The question is answered in the negative and in favour of the Revenue.