Eastern Chemical & Minerals

Vs

Commissioner of Income-Tax

Civil Appeal Nos. 526-28 of 1992

(S. P. Bharucha, S. M. Quadri, R. C. Lahoti JJ)

09.03.1999

JUDGMENT

BHARUCHA, J. -

1. Under appeal is the decision of a Division Bench of the High Court at Madras. The Division Bench answered in the negative and or favour of the Revenue the following questions :

> "1. Whether on the facts and in the circumstances of the case, the Appellate Tribunal was right in holding that having regard to the Notification under Section 104(3) of the Income Tax Act, 1961 in S.O. No. 3210 dated 8-8-1969 issued by the Government, the assessee was not liable to pay additional tax under Section 104 of the Income Tax Act 1961 for any of the assessment years from 1972-73 to 1974-75 ?
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> 2. Whether on the facts and in the circumstances of the case, the Appellate Tribunal was right in holding that the amounts realised by the assessee from the transfer of its import licences constituted sales proceeds derived by it from its export within the meaning of Notification S.O. No. 3210 dated 8-8-1969 and therefore the assessee would be entitled to enjoy the exemption from the operation of the provision to Section 104 of the Income Tax Act, 1961 ?"

2. As indicated in the questions, we are concerned with Assessment, Years 1972-73 to 1974-75.

3. To appreciate what is involved, it is necessary to set out at the outs the provisions of Section 104 of the Income Tax Act, 1961, so far as they are relevant :

> "104. Income tax on undistributed income of certain companies. - (1) Subject to the provisions of this section and of Sections 105, 106, 107 and 107-A, where the Income Tax Officer is satisfied that in respect of any previous year the profits and gains distributed as dividends by any company within the twelve months immediately following the expiry of that previous year are less than the statutory percentage of the distributable income of the company of that previous year, the Income Tax Officer shall make an order in writing that the company shall, apart from the sum determined as payable by it on the basis of the assessment under Section 143 or Section 144, be liable to pay income tax at the rate of -
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> (a) fifty per cent., in the case of an investment company,

(b) thirty-seven per cent., in the case of a trading company, and

(c) twenty-five per cent., in the case of any other company,

on the distributable income as reduced by the amount of dividends actually distributed, if any.

#(2) * * *##

(3) If the Central Government is of opinion that it is necessary or expedient in the public interest so to do, it may, by notification in the Official Gazette and subject to such conditions as may be specified therein, exempt any class of companies to which the provisions of this section apply from the operation of this section."

4. A Notification dated 8-8-1969 (S.O. No. 3210) was issued in exercise the powers conferred by Section 104(3). It read thus :

"In exercise of the powers conferred by sub-section (3) of Section 104 of the Income Tax Act, 1961 (43 of 1961) and in partial modification of the Ministry of Finance (Department of Revenue and Insurance) Notification No. S.O. 2007 dated 6-6-1967, the Central Government, being of opinion that it is necessary and expedient in the public interest so to do, hereby exempts every Indian company [not being an investment company as defined in clause (ii) of Section 109 of the Act] from the operation of the said Section 104, in respect of the previous year relevant to the assessment year commencing on 1-4-1970, and any subsequent year :

Provided that such Indian company, in the course of its business, -

(a) exports any goods or merchandise out of India; or

(b) performs any constructional operations or renders any service outside India; or

(c) provides or makes available to any enterprise or institution, association, or other body established outside India, any technical know-how being any patent, invention, model, design, secret formula or process, or similar property right, or information concerning industrial, commercial or scientific knowledge, experience or skill;

and the sale proceeds of the exports referred to in Item (a) or, as the case may be, the income accruing to the company from the activities of its business referred to in Item (b) or (c) is received in or brought into India by the company or on its behalf in accordance with the Foreign Exchange Regulation Act, 1947 (7 of 1947), and any rules and orders made thereunder :

Provided further that the sale proceeds derived by the company from the exports, if any, referred to in Item (a) and the gross receipts derived by it from the activities of its business referred to in Item (b) or Item (c) or both, during the previous year, amount, in the aggregate, to 50 per cent. or more of the aggregate amount of the sale proceeds and all other gross receipts of the business during the previous year credited to the profit and loss account of the company."

5. The assessee had, by a letter dated 26-3-1969 written by the Government of India, Ministry of Commerce, been granted permission export for the purpose of a barter deal, ferro-silicon manufactured by the Mysore Iron and Steel Works, Bhadravati, up to a value of Rs. 52 lakhs, (F.O.B.). Against this value, the assessee was permitted to import pesticides, as therein enumerated of a total value that did not exceed Rs. 22 lakhs. The assessee was informed that the import licences that would be issued in this regard could be endorsed in favour of actual users on the list of the Director General, Technical Development.

6. The assessee claimed that it was entitled to the exemption from the levy of additional income tax under Section 104(1) read with the said Notification. For this purpose, it relied upon the income derived from the exports that it had made as also upon the consideration that it had realised for the assignment of the import licences obtained pursuant to such exports. The Income Tax Officer rejected the assessee's contention. The Commissioner of Income Tax (Appeals) accepted it, as also did the Income Tax Appellate Tribunal. The Tribunal noted that it was common ground the if the realisation from the transfer of the assessee's import licences were considered as sale proceeds derived from exports, they would constitute more than 50% of the aggregate amount of the gross receipts credited to the profit and loss account for all the assessment years. It was the contention of the Revenue that the import licence realisation could not be treated as such sale proceeds. The Tribunal relied upon a judgment of the Madras High Court in CIT v. Wheel and Rim Co. of India Ltd. (1977) 107 ITR 168 (Mad) and held that having regard to the integrated nature of the scheme, the import licence realisation by the assessee would constitute sale proceeds derived by it from exports within the meaning of the said notification.

7. Arising out of the judgment and order of the Tribunal, the questions quoted above were referred to the High Court. The High Court found rightly that the judgment in the earlier case referred to above was distinguishable of facts. It analysed the said notification and held that an assessee would get its benefit only after it exported goods out of India and received the sale proceeds of the exports in India. The receipts from the transfer of import licences by the assessee to actual users in India did not fall within the meaning of the said notification. Admittedly, the import licences had been sold by the assessee in India and the sale proceeds thereof had been realised in India. The profit realised on such sales could not be considered as a part of export sale proceeds. Accordingly, the High Court reversed the Tribunal' conclusion.

8. What is involved in this appeal is the construction of the said notification and, particularly, the provisos thereof. Ale Notification exempts every Indian company from the operation of Section 104 in respect of the previous year relevant to the assessment year commencing on 1-4-1970 and in subsequent years and we now quote only what the relevant words are thereof :

> "Provided that such Indian company in the course of its business exports any goods or merchandise out of India and the sale proceeds of the exports is received in or brought into India by the company or on its behalf in accordance with the Foreign Exchange Regulation Act, 1947 (7 of 1947) and any rules and orders made thereunder; provided further that the sale proceeds derived by the company from the exports during the previous year amount, in the aggregate, to 50% or more of the aggregate amount of the sale proceeds and all other gross receipts of the business during the previous year credited to the profit and loss account of the company."

9. For the purposes of determining whether the sale proceeds derived by an assessee from exports amount to 50% or more of its aggregate gross income, what is to be taken into account are "the sale

proceeds of the exports"; that is to say, the export "of any goods or merchandise out of India". Secondly, the sale proceeds of the exports have to be received in or brought into India in accordance with FERA. What is contemplated is the export of goods or merchandise out of India, such export to he paid for in India or abroad. If paid for abroad, such amount has to be brought into India in accordance with the provisions of FERA. Clearly, the consideration received by an assessee for assignment of import licences received pursuant to the exports cannot be taken into account for the purpose of determining whether the sale proceeds derived by the assessee from exports amount to 50% or more of its aggregate gross income.

10. No doubt, the barter deal entitles the assessee to import licences. The assessee is further entitled to assign these import licences to actual users, but the consideration that it receives in regard to such assignment falls outside the scope of the two requirements of the said notification. It may be that, as argued by the learned counsel for the assessee, the import licences are intended to compensate the assessee for any loss that it has incurred by reason of export at competitive international rates. Nonetheless, for the purposes of the said notification, the consideration received by the assessee upon assignment of such import licences does not fall within the requirements of the said notification as analysed above and cannot be taken into account in determining whether 50% or more of the assessee's income is derived from the sale proceeds of exports.

11. We affirm the judgment of the High Court and dismiss the appeal with costs.