CALCUTTA HIGH COURT

S.P. Jaiswal Estates (P.) Ltd

Vs

Commissioner of Income-Tax

(Suhas Chandra Sen and B P Banerjee, JJ.)

19.05.1994

JUDGMENT

Suhas Chandra Sen, J.

1. The Tribunal has referred the following questions of law under Section 256(1) of the Income-tax Act, 1961 :

2. The questions, at the instance of the assessee, arising out of Income-tax Appeal No. 1298/(Cal) of 1983 filed by the assessee are :

> " (1) Whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that the hotel building owned by the company and used for the purposes of carrying on hotel business was not a 'plant' for the purpose of calculation of depreciation ?
> (2) Whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that the company was not entitled to depreciation and extra-shift depreciation on building applicable in the case of plant ?
> (3) Whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that the company was not an industrial company mainly engaged in the manufacture of goods ?
> (4) Whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that the rate of income-tax applicable to the company will be that applicable to a non-industrial company ?"

2. The question, at the instance of the Department, arising out of Income-tax Appeal No. 1298/(Cal) of 1983 is :

> " Whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that preparation of food in the hotel constituted manufacture or production of any article or thing within the meaning of Section 32A of the Income-tax Act, 1961 ?"

3. The question, at the instance of the Department, arising out of Income-tax Appeal No. 1575/(Cal) of 1983 filed by the Department is :

> " Whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that the assessee was entitled to deduction of the amounts relating to municipal corporation tax and multi-storeyed building tax for the earlier years notice of which the assessee received in the instant previous year, while the assessee maintained accounts in the mercantile system ?"

4. The year of assessment involved is 1980-81. The assessee is a resident company. It runs a five-star hotel in Calcutta styled as Hotel Hindusthan International. It maintained accounts in mercantile system. Its previous year relevant to the assessment year 1980-81 ended on Diwali of 1979 corresponding to October 19, 1979. The relevant facts out of which the questions arise are these :

(A) The assessee claimed investment allowance of Rs. 2,28,886 on plant and machinery said to have had been installed during the previous year. The Income-tax Officer did not allow investment allowance under section 52A of the Act, since, according to him, the business of the hotel which was being carried on by the assessee was not in the nature of industrial undertaking as it did not manufacture or produce any article or thing.
(B) The Income-tax Officer allowed depreciation on the hotel building at 2.5 per cent.
(C) The Income-tax Officer charged tax at 65 per cent. treating the assessee-company as a non-industrial company.
(D) There was fresh assessment by the Municipal Corporation, Calcutta, with retrospective effect from the fourth quarter of 1975-76. Consequently, a notice for the additional liability of Rs. 6,57,867 was served upon the assessee on October 15, 1979. The assessee made provision for the said additional liability of municipal tax and claimed deduction thereof. The Income-tax Officer did not entertain the claim made by the assessee on the ground that the liability for the said taxes related to the earlier years. The West Bengal Multi-Storeyed Building Tax Act, levying a tax on mutli-storeyed buildings, was enacted in the instant previous year, but it created the liability to pay the tax with retrospective effect from July 1, 1975. The assessee, therefore, made a provision of Rs. 95,837 on account of multi-storeyed building tax and claimed deduction therefor. The claim was turned down by the Income-tax Officer on the ground that the taxes levied were in respect of the earlier years. The assessee filed an appeal against the assessment order before the Commissioner of Income-tax (Appeals).
(A) The Commissioner of Income-tax (Appeals) held that the business of the hotel carried on by the assessee-company was not in the nature of an industrial undertaking. He, therefore, confirmed the disallowance of Rs. 2,28,886 made by the Income-tax Officer on account of investment allowance.
(B) The Commissioner of Income-tax (Appeals) did not agree with the contention of the assessee

that the assessee was engaged in the manufacture and production of goods and as such the building was a factory building. He, therefore, confirmed the order of the Income-tax Officer retaining the depreciation on the building at 2.5 per cent.
(C) The Commissioner of Income-tax (Appeals) also confirmed the finding of the Income-tax Officer that the assessee-company was not an industrial company and as such was chargeable to tax at 65 per cent.
(D) The Commissioner of Income-tax (Appeals), however, accepted the claim to deductions of Rs. 6,57,867 and Rs. 95,837 on account of corporation tax and multi-storeyed building tax, respectively, on the ground that the liability, though pertained to the earlier years arose in the instant previous year.

5. The assessee and the Department both went up in appeal before the Tribunal to the extent they were aggrieved by the order of the Commissioner of Income-tax (Appeals).
(A) It was claimed by the assessee in appeal that it was entitled to investment allowance under Section 32A on the reasoning that in the hotel articles of food were prepared from raw materials and as such there was manufacturing activity. The Tribunal, for the reasons contained in paragraphs 2 to 6 of the order dated March 21, 1986, in Income-tax Appeals Nos. 937/(Cal) of 1982 and 666/(Cal) of 1983 in the assessee's own case, reached the finding that the assessee was entitled to investment allowance only on such machinery and plant as were required for the manufacture or production of food. The Tribunal also held that the activity in the business of the hotel was not primarily an industrial undertaking, (B) In the original grounds of appeal, the objection of the assessee ' was restricted to non-allowance of depreciation on the building of the hotel at five per cent. By way of additional ground, the assessee sought to claim that the entire building of the hotel should be allowed. In that context, the assessee further claimed extra-shift depreciation for three shifts. For the reasons stated in paragraphs 7 and 8 of the order dated March 21, 1983, of the Tribunal in Income-tax Appeal No. 937/(Cal) of 1982 and 666/ (Cal) of 1983, the Tribunal held that the building of the hotel cannot be treated as a plant. The Tribunal confirmed the order of the Commissioner of Income-tax (Appeals) that the assessee was entitled to depreciation at the ordinary rate applicable to buildings.
(C) For the reasons stated in paragraph 18 of the order dated March 21, 1986, in Income-tax Appeals Nos. 937/(Cal) of 1982 and 666/ (Cal) of 1983, it has been held by the Tribunal that the assessee is not mainly engaged in the manufacture of goods and, as such, it is not an industrial company. The finding of the Commissioner of Income-tax (Appeals) charging tax at 65 per cent. has, therefore, been upheld.
(D) As to the allowances of Rs. 6,57,867 and Rs. 95,837 in respect of provision for corporation tax and multi-storeyed building tax, the Tribunal, vide paragraph 10 of the order, held that the assessee was entitled to deduction of the said amounts since the liability for those taxes, though pertained to the earlier years, came to the knowledge of the assessee in the instant previous year.

6. On the first question raised by the assessee, it has been contended that "plant" was not necessarily confined to an apparatus which was used for mechanical operations or process or was

employed in mechanical or industrial business. In order to qualify as "plant", the particular article had to have some degree of durability. The test to be applied was : Did the article fulfil the function of a "plant" in the assessee's trading activity ? Was it a tool of his trade with which he carried on his business ? If the answer was in the affirmative, it would be a "plant".

7. It was contended by the assessee that the aforesaid principle was laid down by the Supreme Court in the case of Scientific, Engineering House P. Ltd. v. CIT . It was argued that if this test was applied then the hotel building was an apparatus used by the assessee in its business and had to be treated as "plant" for the purpose of calculation, of depreciation. We were also referred to the decision of the Supreme Court in the case of CIT v. Taj Mahal Hotel . In that case the Supreme Court held that the sanitary and pipeline fittings fell within the definition of "plant" in Section 10(5) of the Indian Income-tax Act, 1922, and the assessee was entitled to development rebate in respect thereof under Section 10(2)(vib). The fact that the assessee had claimed depreciation on the basis that the sanitary and pipeline fittings fell under "furniture and fittings" in Rule 8(2) of the Indian Income-tax Rules, 1922, and did not detract from the position. Referring to the meaning of the expression "plant", the Supreme Court observed (at page 47) :

> " Now, it is well-settled that where the definition of a word has not been given, it must be construed in its popular sense if it is a word of every day use. Popular sense means 'that sense which people conversant with the subject-matter with which the statute is dealing, would attribute to it'. In the present case, Section 10(5) enlarges the definition of the word 'plant' by including in it the words which have already been mentioned before. The very fact that even books have been included shows that the meaning intended to be given to 'plant' is wide. The word 'includes' is often used in interpretation clauses in order to enlarge the meaning of the words or phrases occurring in the body of the statute. When it is so used, these words and phrases must be construed as comprehending not only such things as they signify according to their nature and import, but also those things which the interpretation clause declares that they shall include. The word 'include' is also susceptible of other constructions which it is unnecessary to go into."

8. It must, however, be noted that in that judgment A. N. Grover, distinguished the English decision in the case of J. *Lyons and Co. Ltd. v. Attorney-General*[1] by pointing out that electric lamps and fittings in a tea shop were not parts of the apparatus used for carrying on the business but were part of the setting in which the business was carried on, and, therefore, were not "plant".

9. The question, therefore, is whether having regard to the assessee's business of hotel, the building can be treated as a "plant". In other words was the building a tool of the assessee's trade or the setting in which the assessee's business was carried on. The assessee's hotel rooms had to be let out in the course of the assessee's business. The entire building has to be used by the assessee for carrying on its hotel business. The business of the assessee is of a nature where the building has to be treated as a tool of his trade. The building is not a setting or a canopy under

which the assessee carries on its business. Therefore, in view of the principles laid down in the aforesaid cases, it must be held that the hotel building, owned by the assessee and used for the purpose of carrying on its hotel business was an apparatus with which the assessee's hotel business was carried on. It cannot be treated as a setting, within which or a canopy under which, the assessee carried on its business. Having regard to the nature of the assessee's business it is to be held that the hotel building is to be treated as a "plant" for the purpose of depreciation allowance under Section 32.

10. In that view of the matter, the first two questions are answered in the negative and in favor of the assessee.

11. Questions Nos. 3 and 4 are answered in favour of the assessee by holding that the assessee is to be treated as an industrial company in view of the decision of this court in the assessee's own case in Reference No. 74 of 1990 (S. *P. Jaiswal Estates P. Ltd v. CIT*[2]) in which the judgment was delivered on September 22, 1993, in respect of the assessment year 1982-83.

12. Apart from the questions dealt with, there are two other questions raised by the Revenue. Question No. 2 is concluded by the judgments of this court in the cases of *CIT v. India Foils Ltd*[3]. and *Avery India Ltd. v. CIT*[4]. Following the aforesaid decisions, question No. 2 is answered in the affirmative and in favour of the assessee.

13. So far as question No. 1, raised by the Revenue, is concerned, there is a little difficulty. A view was taken in the case of CIT v. Sky Room Pvt. Ltd in which if was held that if the assessee was producing bread by using wheat and other ingredients, the activity of the assessee had to be regarded as "manufacture or processing".

14. Mr. Poddar has fairly invited our attention to another judgment of this court in the case of *CIT v. S. P. Jaiswal Estates (P.) Ltd*[5]. in respect of the assessment year 1981-82 in which it was held that preparation of food in the hotel may be construed as manufacture or production of any article or thing but the assessee was not entitled to get investment allowance under Section 32A in view of the fact that the assessee had other activities which were not in the nature of manufacture or production of any article or thing; for example, the assessee was offering

Entertainment

and other services. This was a formidable difficulty in the way of the assessee's claim in respect of investment allowance. It was pointed out that the preparation and supply of food by a restaurant and the same act by a hotel-keeper did not stand on the same footing.

15. Mr. Poddar has invited our attention to the language of Section 32A. The relevant portion of the said section is as follows :

" 32A. (1) In respect of a ship or an aircraft or machinery or plant specified in Sub-section (2), 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, be allowed a deduction, in respect of the previous year in which the ship or aircraft was acquired or the machinery or plant was installed or, if the ship, aircraft, machinery or plant is first put to use in the immediately succeeding previous year, then, in respect of that previous year, of a sum by way of investment allowance equal to twenty-five per cent. of the actual cost of the ship, aircraft, machinery or plant to the assessee. . . .
(2) The ship or aircraft or machinery or plant referred to in Sub-section (1) shall be the following, namely : --
(a) a new ship or new aircraft acquired after the 31st day of March, 1976, by an assessee engaged in the business of operation of ships or aircraft ;
(b) any new machinery or plant installed after the 31st day of March, 1976,--
(i) for the purposes of business of generation or distribution of electricity or any other form of power ; or
(ii) in a small-scale industrial undertaking for the purposes of business of manufacture or production of any article or thing ; or
(iii) in any other industrial undertaking for the purposes of business of construction, manufacture or production of any article or thing, not being an article or thing specified in the list in the Eleventh Schedule."

16. It is clear that the allowance is to be given "in respect of a ship or an aircraft or machinery or plant specified in Sub-section (2)". So, there is no dispute that plant or machinery in question was owned by the assessee and was wholly used for the purpose of the assessee's business. Now, in order to qualify for investment allowance, it is to be seen whether the plant or machinery was utilised for the purpose of the business of "manufacture or production of any article or thing". There is no dispute that the plant or machinery in respect of which the investment allowance is being claimed was being utilised in the restaurant division of the assessee's business. It was being utilised for the manufacture or production of articles or things as mentioned in that sub-section.

17. Mr. Poddar has contended that the assessee does not have to establish that the entire hotel was engaged in the manufacture or production of articles or things in order to qualify for this allowance. The only thing that has to be established is that the plant or machinery in respect of which investment allowance is being claimed was being utilised for the manufacture or processing of any article or thing, as the case may be.

18. There is considerable force in the contention advanced by Mr. Poddar, but since there is already a judgment to the contrary we are of the view that this matter must go to the larger Bench. We direct the matter to be placed before his lordship, the Chief Justice, for constituting a larger Bench for considering this question. So, at this stage, we decline to answer question No. 1

raised by the Revenue. This question is referred to the larger Bench.

Bhagabati Prasad Banerjee, J.

19. I agree.

Cases Referred.

1[1944] 1 Ch. 281
2(No. 1) [1994] 209 ITR 298
3[1993] 200 ITR 259
4[1993] 199 ITR 745
5[1992] 196 ITR 179