

KERALA HIGH COURT

Commissioner of Income-Tax

Vs

Nataraj Motor Service

(K Mathew, C.J. T K Iyer and P G Nair, JJ.)

14.09.1971

JUDGMENT

K Mathew, J.

1. This is a reference under Section 256(1) of the Income-tax Act at the instance of the Commissioner of Income-tax. The question of law referred is:

"Whether, on the facts and in the circumstances of the case, the distribution of the assets of the partnership on dissolution between the partners is a transfer or sale as contemplated by the proviso to Section 10(2) (vib) of the Indian Income-tax Act, 1922 ?"

2. The question relates to the assessment year 1959-60, the relevant previous year being the year ended December 31, 1958, The assessee was a firm consisting of two partners. The partnership was engaged in the business of plying buses and lorries. The firm was dissolved with effect from March 1, 1961, and the assets and liabilities were divided between the parties. . In the assessment for 1959-60 the Income-tax Officer had allowed development rebate amounting to Rs. 26,292 to the firm on three new buses purchased during the year 1958. Upon dissolution of the firm the Income-tax Officer initiated proceedings under Section 355(5) of the Income-tax Act, 1961, to withdraw the development rebate granted to the firm, and passed an order rectifying the assessment for 1959-60 by withdrawing the rebate. The assessee preferred an appeal before the Appellate Assistant Commissioner against the order and contended that the firm is a collective name for the partners, and that when they took over the assets of the firm on dissolution, there was no transfer of the assets, as the assets already belonged to the partners, and what they took was what they owned already. The Appellate Assistant Commissioner said that the point in issue was whether there was a transfer of the assets as contemplated by the proviso to Section 10(2)(vib) of the Income-tax Act, 1922. He held that there was a transfer of the assets to the partners by the dissolution, and distribution of the assets between the partners. The appeal was,

therefore, dismissed. The assessee filed an appeal against the order before the Appellate Tribunal and reiterated the contention and relied on the decision of the Supreme Court in Commissioner of Income-tax v. Dewas Cine Corporation, [1968] 68 I.T.R. 240; [1968] 2 S.C.R. 173 (S.C.). where it was held that the distribution of surplus assets for the purpose of adjustment of the rights of the partners consequent on the dissolution of a firm did not amount to transfer of assets. The Tribunal accepted the contention of the assessee, and held that there was no transfer of assets by the dissolution of the firm, and distribution of the assets between the partners.

3. The question that is referred does not really reflect the issue that arose for decision before the Tribunal. That issue was whether the development rebate which was allowed under the provisions of the Income-tax Act, 1922, could be withdrawn under the provisions of Section 34(3)(b) read with Section 155(5) of the Income-tax Act, 1961. The development rebate allowed under the Income-tax Act, 1922, could, after the coming into force of the 1961 Act, be withdrawn only under the provisions of Section 34(3)(b) read with Section 155(5) of the 1961 Act. The Tribunal thought that the withdrawal of the rebate by the Income-tax Officer was under the proviso to Section 10(2)(vib) of the 1922 Act; and has framed the question on that basis. We re-framed the question in order to reflect the real issue for consideration in this case. The question as re-framed would read :

"Whether, on the facts and in the circumstances of the case, the distribution of the assets of the partnership on dissolution between the partners is a sale or transfer as contemplated by Section 34(3)(b) read with Section 155(5) of the Income-tax Act, 1961 ?"

4. That we have got ample power to re-frame the question is clear from the decisions in Narain Swadeshi Weaving Mills v. Commissioner of Excess Profits Tax, [1954] 26 I.T.R. 765; [1955] 1 S.C.R. 952 (S.C.) and Ramcharitar Ram Harihar Prasad v. Commissioner of Income-tax, [1953] 23 I.T.R. 301 (Pat.).

5. The question to be considered in this case lies in a narrow compass. The question is whether the words "otherwise transferred" occurring in Section 34(3)(b) and Section 155(5) would take in distribution of the assets of a partnership between the partners on dissolution of the firm. Section 34(3)(b) provides:

"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 (XI 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."

6. Section 155(5) reads :

"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 (XI 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 Income-tax 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."

7. It was contended on behalf of the revenue that the words "otherwise transferred" occurring in Section 34(3)(b) must be given a wide connotation so as to include the distribution of the assets of the firm on its dissolution between the partners. In Commissioner of Income-tax v. Dewas Cine Corporation, [1968] 68 I.T.R. 240, 243; [1968] 2 S.C.R. 173 (S.C.) the Supreme Court had occasion to consider whether distribution of assets of a firm to the partners on a dissolution of the firm would amount to a sale within the meaning of Section 10(2)(vii) of the Income-tax Act, 1922. That was a case where a firm was allowed depreciation in the assessment of the partnership

in respect of two theatres owned by it. On the dissolution of the partnership subsequently, it was agreed between the partners that the theatres should be returned to their original owners. The Tribunal held that by restoring the theatres to the original owners there was a transfer by the partnership and that the second proviso to Section 10(2)(vii) of the Income-tax Act, 1922, applied. It may be mentioned that each of the partners owned a cinema theatre and when they formed the partnership, they treated the two theatres as assets of the partnership. The Supreme Court held that on the dissolution of the partnership, each theatre had to be deemed to be returned to the original owner in satisfaction partially or wholly of his claim to a share in the residue of the assets but that the theatres were not in law sold by the partnership to the individual partners in consideration of their respective shares in the residue. The decision lays down the principle that the distribution of the assets of partnership on dissolution amounts to an adjustment of the rights of partners in the assets of the partnership and it does not amount to transfer of assets. The following observation of the Supreme Court in that case is relevant:

"Section 48 of the Partnership Act provides for the mode of settlement of accounts between the partners. It prescribes the sequence in which the various outgoings are to be applied and the residue remaining is to be divided between the partners. The distribution of surplus is for the purpose of adjustment of the rights of the partners in the assets of the partnership ; it does not amount to transfer of assets."

8. It was contended on behalf of the revenue that there was no definition of the word "transfer" in the Income-tax Act, 1922, and that the word as defined in Section 2(47) of the Income-tax Act, 1961, is wide enough to cover a distribution between the partners of the assets on the dissolution of the firm, and, therefore, the assets of the firm were "otherwise transferred" within the meaning of Section 34(3)(b). Section 2(47) of the Income-tax Act, 1961, provides :

"'Transfer', in relation to a capital asset, includes the sale, exchange or relinquishment of the asset or the extinguishment of any rights therein or the compulsory acquisition thereof under any law."

9. The assessee in the case, it will be remembered, was the firm ; and for the purpose of income-tax law the firm was a person : See Section 2(31) of the 1961 Act, That person's rights in the partnership property became extinguished by its distribution between the partners. Even if the extinguishment of its rights in the partnership property was simultaneous with its extinction as a person, that would not matter. The question is whether the rights of the firm, the assessee, in the assets of the firm were extinguished by the distribution of the assets between the partners on its dissolution. I think that the extinguishment of the rights of the firm in the partnership property on its distribution between the partners is transfer within the meaning of the words "otherwise transferred" in Section 34(3)(b) of the Income-tax Act, 1961.

10. I, therefore, answer the question (as reframed) in the affirmative and against the assessee. We make no order as to costs.

11. A copy of this judgment will be sent to the Appellate Tribunal under the seal of the High Court and the signature of the Registrar.

12. Krishnamoorthy Iyer, J. (14-9-71).--I regret that I have to disagree.

13. The question raised is whether the words "otherwise transferred by the assessee to any person" in Section 34(3)(b) and Section 155(5)(i) of the Income-tax Act, 1961, will take within their ambit distribution of the assets of a partnership among its members by a deed of dissolution of the firm,

14. In Commissioner of Income-tax v. Dewas Cine Corporation, [1968] 68 I.T.R. 240; [1968] 2 S.C.R. 173 (S.C.) their Lordships of the Supreme Court had to consider the legal effect of a dissolution of the partnership and the consequent return of the assets to the partners for the purpose of the second proviso to Section 10(2)(vii) of the Indian Income-tax Act, 1922. The question considered was whether there was a sale of the respective theatres to the partners as a result of the dissolution deed. In dealing with that question, their Lordships observed at page 243 :

"Under section.46 of the Partnership Act, 1932, on the dissolution of the firm every partner or his representative is entitled, as against all the other partners or their representatives, to have the property of the firm applied in payment of the debts and liabilities of the firm, and to have the surplus distributed among the partners or their representatives according to their rights. Section 48 of the Partnership Act provides for the mode of settlement of accounts between the partners. It prescribes the sequence in which the various outgoings are to be applied and the residue remaining is to be divided between the partners. The distribution of surplus is for the purpose of adjustment of the rights of the partners in the assets of the partnership: it does not amount to transfer of assets.

On dissolution of the partnership, each theatre must be deemed to be returned to the original owner, in satisfaction partially or wholly of his claim to a share in the residue of the assets after discharging the debts and other obligations. But thereby the theatres were not in law sold by the partnership to the individual partners in consideration of their respective shares in the residue. The expressions 'sale' and 'sold' are not defined in the Income-tax Act: those expressions are used in Section 10(2)(vii) in their ordinary meaning. 'Sale', according to its ordinary meaning, is a transfer of property for a price, and adjustment of the rights of the partners in a dissolved firm is not a transfer, nor it is for a price."

15. Counsel for the department distinguished the above decision on the ground that the words "otherwise transferred" now found in Section 34(3)(b) of the 1961 Act were absent in the second proviso to Section 10(2)(vii) of the 1922 Act and because of the definition of the term "transfer" in the 1961 Act, "Transfer in relation to a capital asset", according to Section 2(47) of the 1961 Act, " includes the sale, exchange or relinquishment of the asset or extinguishment of any rights therein or the compulsory acquisition thereof under any law". The term "person" is defined in Section 2, Sub-section (31) of the 1961 Act "to include the firm". In order to satisfy Section 54(3)(b) there has to be a transfer by the assessee to any person. It is not possible to contend in view of the decision of the Supreme Court referred to nor was it contended before us that the deed dissolving the firm is a sale, exchange or relinquishment within the meaning of Section 2(47) of the Income-tax Act, 1961. It was argued before us that there was an extinguishment of the rights of the firm who was the assessee in the partnership property as a result of the dissolution deed and this is sufficient to attract Section 34(3)(b) of the Income-tax Act, 1961. In view of Section 2(23) of the Income-tax Act, 1961, the expression "firm" has the meaning assigned to it in the Indian Partnership Act. According to Section 4 of the Partnership Act, a firm is the collective name of the persons who have entered into partnership with one another and "partnership" is "the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all". Section 48 of the Partnership Act provides that after the dissolution of a firm the residue left after meeting the demands referred to therein shall be divided among the partners in the proportion in which they were entitled to the profits. Section 14 of the Partnership Act defines the property of a firm. Section 14 of the Partnership Act does not define the rights of the partners in the partnership property. They continue to be the joint owners or co-owners of the partnership property. In *Narayanappa v. Bhaskara Krishnappa*, A.I.R. 1966 S.C. 1300 the law regarding a firm was stated thus:

"No doubt, since a firm has no legal existence, the partnership property will vest in all the partners and in that sense every partner has an interest in the property of the partnership. During the subsistence of the partnership, however, no partner can deal with any portion of the property as his own. Nor can he assign his interest in a specific item of the partnership property to any one. His right is to obtain such profits, if any, as fall to his share from time to time and upon the dissolution of the firm to a share in the assets of the firm which remain after satisfying the liabilities set out in Clause (a) and Sub-clauses (i), (ii) and (iii) of Clause (b) of Section 48."

16. During the subsistence of the partnership the administration of the partnership property will have to be only in accordance with the provisions of the Act and the terms of the agreement between the parties. The fact that the firm is a person as defined in the Income-tax Act, 1961, cannot really affect the question. In order to attract Section 34(3)(b) there must be a transfer by

the assessee to any person. Even if it is possible to hold that there is an extinguishment, the extinguishment must be at the instance of the assessee. The fact that a firm is a person for the purposes of Income-tax Act does not mean that the partners ceased to be the co-owners of the property and the ownership as such is vested in the firm. No doubt the firm is for the purpose of assignment treated as a separate entity. But that does not mean that the partnership is a legal person having a corporate character distinguished from that of its members. I do not think that any greater rights are created because of the definition of "person" in the 1961 Act.

17. The decision of their Lordships of the Supreme Court is that the distribution of assets of a firm among its partners as a result of its dissolution by the application of Section 48 of the Partnership Act is not a transfer. As a result of the dissolution there is only an extinguishment of the co-ownership rights of the partners in the partnership property and this position is not in any way altered by the change in the wording of Section 34(3)(b) of the Income-tax Act, 1961, or the definition of the word "person" therein.

18. I, therefore, answer the question reframed in the negative, that is against the revenue. I make no order as to costs.

19. In view of the difference of opinion, the case is placed before the learned Chief Justice for being posted before a third Judge.

20. Govindan Nair, J. (6-1-72).--The following question has been referred to this court under Section 256(1) of the Income-tax Act, 1961, at the instance of the Commissioner of Income-tax :

"Whether, on the facts and in the circumstances of the case, the distribution of the assets of the partnership on dissolution between the partners is a transfer or sale as contemplated by the proviso to Section 10(2)(vib) of the Indian Income-tax Act, 1922 ?"

21. A Division Bench of this court consisting of K. K. Mathew and T. S. Krishnamoorthy Iyer JJ. heard this reference but came to different conclusions ; K. K. Mathew J. answering the question (as reframed) in the affirmative, that is against the assessee and Krishnamoorthy Iyer J. in the negative. In view of this difference of opinion the case has been placed before me in accordance with Section 259(2) of the Income-tax Act, 1961. The assessee is a firm consisting of two partners. The partnership was engaged in the business of plying buses and lorries. In the assessment for the year 1959-60 the Income-tax Officer had allowed development rebate on three new buses purchased during the year 1958 amounting to Rs. 26,292. The relevant previous year for the assessment year 1959-60 is that which ended on December 31, 1958. The firm was dissolved with effect from March 1, 1961, and the assets and liabilities were divided between the parties. On the dissolution of the firm the Income-tax Officer initiated proceedings under Section

155(5) of the Income-tax Act, 1961 to withdraw the development rebate granted to the firm and passed an order rectifying the assessment for 1959-60 by withdrawing the rebate. In appeal before the Appellate Assistant Commissioner the assessee contended that there was no transfer of the assets and, therefore, the development rebate should not have been withdrawn. This contention was negated by the Appellate Assistant Commissioner who took the view that there was a transfer of the assets as contemplated by the proviso to Section 10(2)(vib) of the Indian Income-tax Act, 1922, and accordingly dismissed the appeal. The assessee, however, succeeded in further appeal before the Appellate Tribunal. The Tribunal, relying on the decision of the Supreme Court in Commissioner of Income-tax v. Dewas Cine Corporation, [1968] 68 I.T.R. 240; [1968] 2 S.C.R. 173 (S.C.) upheld the contention of the assessee that the distribution of surplus assets for the purpose of adjustment of the rights of the partners consequent on the dissolution of the firm did not amount to transfer of assets.

22. The question that was referred was reframed as it did not reflect the issue that arose for decision before the Tribunal. The reframed question runs thus:

"Whether, on the facts and in the circumstances of the case, the distribution of the assets of the partnership on dissolution between the partners is a sale or transfer as contemplated by Section 34(3)(b) read with Section 155(5) of the Income-tax Act, 1961 ?"

23. The question was so reframed on the ground that the development rebate allowed under the Indian Income-tax Act, 1922, for the assessment year 1959-60 could, after coming into force of the Income-tax Act, 1961, be withdrawn only under the provisions of Section 34(3)(b) read with Section 155(5) of the Income-tax Act, 1961. Both the judges have concurred in this view and the point does not arise, therefore, before me.

24. The only point arising for decision, therefore, is whether action can be taken under Section 155(5) of the Income-tax Act, 1961, to withdraw the development rebate allowed for the year 1959-60 on the ground that the lorries in question had been "otherwise transferred by the assessee to any person". I may extract Section 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 (XI 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 Income-tax 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."

25. There is no case that the lorries had been sold. The lorries were purchased during the year 1958 and, therefore, Section 153(5) would apply as the purchase was after the 31st day of December, 1957.

26. The Supreme Court had to consider the question whether the distribution of the assets on dissolution of a firm would amount to a sale so as to attract the second proviso to Section 10(2)(vii) of the Indian Income-tax Act, 1922, in Commissioner of Income-tax v. Dewas Cine Corporation. Their Lordships observed:

"On dissolution of the partnership, each theatre must be deemed to be returned to the original owner, in satisfaction partially or wholly of his claim to a share in the residue of the assets after discharging the debts and other obligations. But thereby the theatres were not in law sold by the partnership to the individual partners in consideration of their respective shares in the residue. The expressions 'sale', and 'sold' are not defined in the Income-tax Act: those expressions are used in Section 10(2)(vii) in their ordinary meaning. 'Sale', according to its ordinary meaning, is a transfer of property for a price, and adjustment of the rights of the partners in a dissolved firm is not a transfer, nor it is for a price."

27. The decision in Commissioner of Income-tax v. Dewas Cine Corporation, [1968] 68 I.T.R.,

240; [1968] 2 S.C.R. 173 (S.C.) was referred to with approval by the Supreme Court in the decision in Commissioner of Income-tax v. Bankey Lal Vaidya, [1971] 79 I.T.R. 594 (S.C.). The question that arose there was whether Section 12B(1) of the Indian Income-tax Act, 1922, was attracted on the dissolution of a firm and on an agreement between the two partners that the assets of the firm be taken over by one of them and the other paid a sum of Rs. 1,25,000. Section 12B of that Act provided that tax will be payable by an assessee under the head "capital gains" in respect of any profits or gains arising from the sale, exchange or transfer of a capital asset effected after the 31st day of March, 1946. The question therefore was whether there was any sale, exchange or transfer of a capital asset on the dissolution of the firm and the taking over of the assets by one of the partners and the payment of the money to the other. Two passages from the judgment may be usefully extracted :

"In the case in hand there is no sale and payment of price, but payment of the value of share under an arrangement for dissolution of the partnership and distribution of the assets. The rights of the parties were adjusted by handing over to one of the partners the entire assets and to the other partner the money-value of his share. Such a transaction is not in our judgment a sale, exchange or transfer of assets of the firm.

In Commissioner of Income-tax v. Dewas Cine Corporation, in dealing with the meaning of the expressions 'sale' and 'sold' as used in Section 10(2)(vii) of the Income-tax Act, 1922, this court observed that the expression 'sale' in its ordinary meaning is a transfer of property for a price, and adjustment of the rights of the partners in a dissolved firm by allotment of its assets is not a transfer for a price at that case the assets were distributed among the partners and it was contended that the assets must in law be deemed to be sold by the partners to the individual partners in consideration of their respective shares, and the difference between the written-down value and the price realised should be included in the total income of the partnership under the second proviso to Section 10(2)(vii). This court observed that a partner may, it is true, in an action for dissolution insist that the assets of the partnership be realised by sale of its assets, but property allotted to a partner in satisfaction of his claim to his share, cannot be deemed in law to be sold to him."

28. These decisions, I think, must conclude the matter. Mathew J., however, felt that, in view of the definition of the term "transfer" in Section 2(47) of the Income-tax Act, 1961, and the definition of the term "person" in Section 2(31) of the 1961 Act, it must be held that there has been a transfer as defined in Section 2(47) of the 1961 Act and that therefore the depreciation allowance originally allowed should be deemed to have been wrongly allowed. With great respect, I think, the definition of the term "person" in Section 2(31) does not affect the question. Even without such a definition the Supreme Court has held in Commissioner of Income-tax v.

S.V. Angidi Chettiar, [1962] 44 I.T.R. 739 : [1962] Supp. 2 S.C.R. 640 (S.C.) that the firm is a person for income-tax purposes in view of the definition of person in the General Clauses Act. That is What their Lordships said :

"The expression 'person' is defined in Section 2(a) of the Act as including 'a Hindu undivided family and a local authority'. That evidently is not an exhaustive definition and recourse is permissible to the General Clauses Act which says in Section 3(42) that a 'person' includes 'any company or association or body of individuals whether incorporated or not'. A firm is manifestly a body of individuals and would therefore fall within the definition of 'person', and may be exposed to an order for payment of penalty in the circumstances set out in Clauses (a), (b) and (c) of Section 28 of the Income-tax Act."

29. So by including a firm within the ambit of the definition of "person" in Section 2(31) of the 1961 Act no material change has been made. It is unnecessary to consider the effect of the definition in Section 2(47) of the 1961 Act because that definition cannot apply to the dissolution of a firm and the distribution of its assets (which it is contended will amount to a transfer of its assets to its partners) which took place before the 1961 Act came into force. I may repeat that the dissolution of the firm and the distribution of the assets was with effect from March 1, 1961. The assessment order, annexure A, states that the deed of dissolution by the partners was on April 5, 1961, and that the partners divided the assets and liabilities among themselves in equal shares. This was an event that took place before the 1961 Act came into force and, therefore, the definition of the term "transfer" in Section 2(47) of the 1961 Act cannot be applied to that event unless there is an express provision in the Act making the definition applicable to such a transfer or by necessary implication the definition is made applicable to such events. No doubt, Section 155(5) which I have already read as well as Section 34(3)(b) take note of transfers that took place before the coming into force of the Act. These sections, however, do not say or provide that what were not transfers at the time they took place shall be deemed to be transfers under the Act. Nor do these sections make the definition in Section 2(47) applicable to events that took place before the Act. I may extract Section 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 Section 33 or under the corresponding provisions of the Indian Income-tax Act, 1922 (XI 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 :"

30. I do not find anything in the above section or Section 155(5) which expressly or by necessary

implication makes the definition of the term "transfer" in Section 2(47) of the 1961 Act applicable to events that took place before the date on which the Act came into force. It is therefore unnecessary to consider the question whether any change is intended by introducing Section 2(47) in the 1961 Act which deals with a transfer in relation to a capital asset. Whether there was a transfer or not in this case must be decided without reference to Section 2(47), because the alleged transfer was before the section came into force. No doubt, if there was a transfer, Section 155(5) can be applied. But the Supreme Court decisions referred to are clear authorities for the proposition that in the circumstance such as that obtaining here there can be no transfer.

31. I, therefore, agree with Krishnamoorthy Iyer J. and answer the question as refrained in the negative, that is, in favour of the assessee and against the department.

32. I direct the parties to bear their respective costs.

33. A copy of this judgment under the seal of the High Court and the signature of the Registrar will be sent to the Appellate Tribunal as required by Sub-section (1) of Section 260 of the Income-tax Act, 1961.