

KERALA HIGH COURT

Blue Bay Fisheries (P.) Ltd

Vs

Commissioner of Income-Tax

(T Kochu Thommen and K R Menon, JJ.)

02.01.1987

JUDGMENT

Kochu Thommen, J.

1. The following questions have been referred to us at the instance of the assessee by the Income-tax Appellate Tribunal, Cochin Bench :

- "1. Whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that the development rebate originally granted for the assessment year 1966-67 in relation to the trawler 'Sea Queen' was liable to be withdrawn ?
2. If the answer to question No. 1 is in the affirmative, whether the Tribunal was justified in holding that the income for the assessment year 1967-68 would, as a consequence of the decision for the assessment year 1966-67, fall to be recomputed ? "

2. The assessee is a company carrying on the business of fishing. It purchased a trawler named " Sea Queen " in the year ending March 31, 1965. It, therefore, claimed and was granted development rebate for the assessment year 1966-67 in the sum of Rs. 1,46,213. Accordingly, the Income-tax Officer computed the loss of the assessee for that assessment year at Rs. 53,562. For the following assessment year 1967-68, the Income-tax Officer computed the income of the assessee at Rs. 2,05,555 after setting off the loss of the previous assessment year.

3. On October 28, 1972, the assessee entered into an agreement (annexure D) with Shaparia Dock & Steel Co. P. Ltd., Bombay (" the transferee "). This agreement provided that the trawler was leased to the transferee for a sum of Rs. 50,000, subject to the transferee depositing with the assessee a sum of Rs. 1,00,000 by way of security. It was further agreed that at the end of ten months, the trawler would be sold to the transferee and the deposit amount would be adjusted towards the total sale consideration. In accordance with the agreement, the assessee took steps to obtain the approval of the concerned authority for the sale of the vessel in accordance with Sections 42 and 43 of the Merchant Shipping Act, 1956. After obtaining such approval, the trawler was sold on March 29, 1974.

4. The Income-tax Officer thereupon initiated proceedings under Section 155(5) read with Section 34(3)(b) of the Income-tax Act, 1961, for withdrawing the rebate which had been granted

to the assessee for the assessment year 1966-67 on the ground that the assessee had sold the trawler within eight years from the end of the previous year in which the trawler was acquired. According to the officer, the sale took place on October 28, 1972, when annexure D agreement was executed and not, as contended by the assessee, on March 29, 1974, when the sale was actually completed in accordance with the provisions of the Merchant Shipping Act. The officer accordingly by his order dated March 16, 1977, treated the amount representing the development rebate as part of the assessee's income for the year 1966-67. Further, by his order dated March 28, 1977, the officer redetermined the assessee's income for the assessment year 1967-68 by rectification under Section 154.

5. Aggrieved by these two orders, the assessee appealed to the Appellate Assistant Commissioner. The assessee contended that the officer wrongly withdrew the development rebate on the mistaken assumption that the sale of the trawler took place within the period of eight years. Accepting that contention, the Appellate Assistant Commissioner found that the relevant provisions of the Merchant Shipping Act being mandatory, no sale could have occurred until the requirements of those provisions were satisfied. He thus held that the sale of the trawler took place outside the period of eight years. On appeal by the Revenue, the Tribunal found that although no sale had actually taken place until after the expiry of the period of eight years, there was within that period a transfer or extinguishment of the right or interest of the assessee, thereby attracting the provisions of Sections 34(3)(b) and 155(5) of the Income-tax Act, 1961.

6. Counsel for the assessee, Shri. S. A. Nagendran submits that the Income-tax Officer had no jurisdiction to withdraw the development rebate unless there was clear proof that the ingredients of Section 34(3)(b) were satisfied. The provisions of the Merchant Shipping Act ought to have been taken into account, counsel points out, in determining whether or not there was a sale or transfer of the trawler during the period of eight years. Counsel relies on the decision of the Supreme Court in *Alapati Venkata-ramiah v. CIT*¹ and the decision of the Andhra Pradesh High Court in *Ghanshyamdas Kishen Chander v. CIT*²

7. It is true, as Shri Nagendran points out, that the trawler could not be sold otherwise than in accordance with the provisions of the Merchant Shipping Act. Sections 42 and 43 being specific and mandatory, any transaction effected without the previous approval of the statutory authority would be null and void. It is not disputed that the approval of the concerned authority was not obtained until after the expiry of the period of eight years. It cannot, therefore, be disputed that no sale of the trawler was effected within the period of eight years. In fact, the Tribunal, rightly in our view, held that that was the position. But the question really is not whether the trawler was sold, but whether the assessee had by reason of the transaction evidenced by annexure D forfeited its right to the development rebate.

8. We shall now read the relevant provisions of the Income-tax Act in so far as they are material. Section 33 reads :

" 33. Development rebate.--(1)(a) In respect of a new ship....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, if the ship ...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)...."
(emphasis* supplied)

9. Section 34(3)(b) provides :

" If any ship,....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.....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,....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." (emphasis* supplied)

10. Section 155(5) says :

" Where an allowance by way of development rebate has been made wholly or partly to an assessee in respect of a ship..... 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.....the ship..... is sold or otherwise transferred by the assessee to any person other than the Government..... ; or.....

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." (emphasis* supplied)

11. These provisions clearly provide that where the assessee sold or otherwise transferred the vessel within a period of eight years from the end of the previous year in which the ship was acquired, the assessee forfeited his right to the development rebate which would be treated as wrongly allowed. These provisions are thus attracted not only upon the sale of the vessel, but also when it is "otherwise transferred".

12. The expression "transfer" was considered by the Supreme Court in *Alapati Venkataramiah v. CIT*³ in the context of section 12B of the Indian Income-tax Act, 1922 (the "1922 Act"). The Supreme Court stated (p. 192):

" Before Section 12B can be attracted, title must pass to the company by any of the modes mentioned in Section 12B, i.e., sale, exchange or transfer. It is true that the word 'transfer' is used in addition to the word 'sale' but even so, in the context, transfer must mean effective conveyance of the capital asset to the transferee. Delivery of possession of immovable property cannot by itself be treated as equivalent to conveyance of the immovable property." (emphasis* supplied)

13. The Supreme Court emphasised the fact that, in the context of Section 12B relating to capital

gains, "transfer" did not imply anything less than effective conveyance of the capital asset to the transferee. Mere transfer of the physical possession pursuant to an agreement to sell the property would not be conveyance of the right, title and interest of the owner so as to attract capital gains. It is significant that this observation was made, as the court pointed out, in the context of Section 12B of the 1922 Act which contained no definition of "transfer". It is also significant that for the purpose of that section, the expression "otherwise transferred" occurring in Section 10(2)(vi)(b) or Section 35(11) of that Act (corresponding to Section 34(3)(b) or Section 155(5) of the present Act) was of no relevance. The passage from the judgment of the Supreme Court which we have set out above was relied on by the Andhra Pradesh High Court in *Ghanshyamdas Kishen Chander v. CIT*⁴, incoming to the conclusion that for the purpose of Section 45 of the present Act, "transfer" had to be understood as one falling within the specific categories enumerated in Section 2(47) of the Act.

14. It is important to notice that the condition upon which the development rebate is granted under Section 33 is that the assessee should have the ownership and user of the vessel wholly for the purpose of his business. If the vessel ceased to be in his ownership and possession wholly for such purpose, he forfeited his right to the rebate. While retaining the ownership, if the assessee parted with the possession and enjoyment of the vessel, the same result would follow. The legislative object in granting development rebate has to be understood as an encouragement to the owner who is in actual enjoyment of his vessel wholly for the purpose of his business. If he was no longer the owner or if he was not, even while retaining the ownership, in such enjoyment of the vessel, he forfeited his right to the rebate.

15. Unlike under the 1922 Act, "transfer" is defined by Section 2(47) of the present Act. This provision, as it stood at the relevant time, read :

" '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." (emphasis* supplied)

16. Significantly, it is an inclusive definition. It specifically refers to sale, exchange, relinquishment, extinguishment or compulsory acquisition. These five categories are specified by way of illustration or for abundant caution and not to exclude other categories which naturally come within the expression "transfer". The expression must be read widely and not narrowly. The definition denotes extension and cannot be treated as restricted. As stated by the Supreme Court in *State of Bombay v. Hospital Mazdoor Sabha*⁵,

" 10.Where we are dealing with an inclusive definition, it would be inappropriate to put a restrictive interpretation upon terms of wider denotation."

17. According to Shri Nagendran, a transfer which does not result in the total extinction of the rights of the transferor by reason of sale, exchange, relinquishment, etc., but retains with him a right of reversion, as in the case of lease, is not a "transfer" which attracts the cancellation of development rebate. This argument is sought to be supported by reference to the aforesaid decision of the Andhra Pradesh High Court.

18. It is true that the Andhra Pradesh High Court, unlike the Supreme Court, dealt with Section 45 of the present Act which defines "transfer". Nevertheless, since that court was concerned with

the question of capital gains which, as stated by the Supreme Court in the context of Section 12B of the 1922 Act, would not arise except upon completion of effective conveyance and not by transfer of mere physical possession, it was perhaps unnecessary to emphasise, or it was perhaps, with great respect, overlooked that Section 2(47) embodied an inclusive definition.

19. The agreement between the parties indicates that the transaction was a lease, if not a mortgage, of the trawler in favour of the transferee. For a period of ten months, the trawler was to remain in the exclusive possession of the transferee, and at the end of that period, it was to be sold to it. Although the sale did not take place until after the expiry of the period of eight years, the transferee was in exclusive possession and enjoyment of the trawler at all relevant times. Furthermore, the transferee who was the intended purchaser was allowed under the agreement to suitably alter the trawler so as to make it a tug. The agreement further shows that the transferee had a lien on the trawler during the period preceding the sale and that the trawler remained under hypothecation to it. All these provisions undoubtedly show that the right to exclusive possession and enjoyment of the trawler had been transferred as early as October 28, 1972, when annexure D agreement was executed. This was within the period of eight years resulting in a transfer of a right or interest in the trawler.

20. The expression "otherwise transferred" occurring in Sections 34(3)(b) and 155(5) is, in our view, wide enough to include a transfer whereunder the right to exclusive possession and enjoyment stood transferred, albeit subject to a right of reversion in favour of the transferor. In the present case, the transfer was permanent and preparatory to sale. In the circumstances, we answer the questions in the affirmative, that is, in favour of the Revenue and against the assessee.

21. We direct the parties to bear their respective costs in these tax referred cases.

22. A copy of this judgment under the seal of the High Court and the signature of the Registrar shall be forwarded to the Income-tax Appellate Tribunal, Cochin Bench.

Cases Referred.

1[1965] 57 ITR 185

2[1980] 121 ITR 121

3[1965] 57 ITR 185

4[1980] 121 ITR 121

5 AIR 1960 SC 610; 17 FJR 423 (SC)