

BOMBAY HIGH COURT

Capsulation Services Pvt. Ltd

Vs

Commissioner of Income-Tax

(K Desai, C.J. R Kantawala, J.)

11.10.1972

JUDGMENT

Kantawala, J.

1. This is a reference under section 66 (1) of the Indian Income-tax Act, 1922, and the question that is referred for our determination is :

"Whether the hiring by M/s. Pure Products and Madhu Canning Ltd. to the assessee-company of a godown belonging to and used by the former for its business purposes amounted to 'transfer' to the latter within the meaning of the phrase 'the transfer to a new business of building previously used in any other business' occurring in section 15C (2) (i) /"

2. The question that is referred to us relates to the period 1958-59 and 1959-60, corresponding to the accounting years ending 30th September of 1957 and 1958, respectively. The assessee-company was incorporated in October, 1952, with the object of carrying on the business of sale and manufacture of gelatine capsules, etc. It took on monthly lease a huge compound pertaining to and used for its business by Messers. Pure Products & Madhu Canning Ltd. on a monthly rent of Rs. 1,500. The factory of the assessee-company was located in the godown which was belonging to Messers. Pure Products & Madhu Canning Ltd. on a monthly rent of Rs. 1,500. The factory of the assessee-company was located in the godown which was belonging to Messers. Pure Products & Madhu Canning Ltd. and it was used by the latter company as its godown for business purposes. Production was commenced by the assessee-company some time after august 1, 1954. For both the assessment years, the assessee-company claimed relief under section 15C of the Act. The relief asked for by the assessee-company was not granted by the Income-tax Officer. He took the view that the assessee-company was carrying on this business in a building which was transferred to it by Messers. Pune Products & Madhu Canning Ltd. and which was previously used by the latter company as a godown for its business purpose. In the appeal preferred by the assessee-company, the finding of the Income-tax Officer was confirmed by the

Appellate Assistant Commissioner. In the appeal by the assessee-company, it was sought to be contended on behalf of the assessee-company that the godown was obtained from Messrs. Pure Products & Madhu Canning Ltd. on the basis of tenancy from month to month and that it did not amount to transfer within the meaning of the word "transfer" as contained in section 5 of the Transfer of Property Act and section 150 of the Income-tax Act; that it was not the intention of the legislature to deny relief to a newly established industrial undertaking, if it carried on business in a rented building; that the assessee-company invested Rs. 7 lakhs in the said business and the area of the business premises used by the assessee-company for its purpose was merely about 2,000 sq. and its value was about Rs. 20,000; that the value of the building used for business purposes was negligible when compared to the huge capital invested by the assessee in the business of the company; that Messrs. Pure Products & Madhu Canning Ltd. were still carrying on the business and that the assessee-company was not formed by the splitting up of the other company or its reconstruction; that the business of both the companies was totally different from each other and that there was no relationship between the directors of the company. The contentions urged by the assessee-company were not accepted by the Tribunal. The Tribunal took the view that there was a clear case of transfer of possession of some of the property from one business to another. The Tribunal, however, felt that it was a hard case, but nonetheless the law had to be administered as it was. In view of the admitted fact that the assessee-company carried on business in a building, that it was transferred to it by another company and which was used by the latter for its business purpose, according to the Tribunal, the relief under section 15C could not be granted to the assessee-company.

3. In the reference before us, Mr. Dastur on behalf of the assessee-company contended that the provisions of section 15C of the Act are meant for the industrial development; that the word "transfer" used in section 15C (2) (i) must mean a transfer by the assessee from one of his business to a new business started by him; that the word "transfer" is not used in the sense in which that word was used under the Transfer of Property Act. Secondly, he contended that even if the word "transfer" is capable of being construed to mean a transfer of ownership of a building and not when rights other than those of ownership in a building are transferred. In any event, he submitted that in no event a creation of a monthly tenancy can be regarded as transfer within the meaning of the Act. Thirdly, his submission was that the creation of a monthly tenancy is not a lease and, even if lease is regarded as a transfer, creation of monthly tenancy cannot be regarded as transfer. Lastly, his submission was that the provisions of section 15C (2) (i) will only apply when the transfer of building therein referred to is essential for the formation of an industrial undertaking; that the undertaking by the nature of its business must need a specific and particular type of a building and if the building is of such type, then alone can it be regarded as being essential for the formation of the industrial undertaking. Mr. Hajarnavis, on the other hand, on behalf of the revenue, contended that there was no warrant for restricting the application of

section 15C (2) (i) in cases where there is a transfer by an assessee to his new business of a building previously used by him is his own other business. It will equally apply in a case where a building is transferred to a new business of a person other than the assessee. His further submission is that the word "transfer" is of very wide amplitude and was not capable of being restricted to cease of ownership of building. His submission was that it is well-settled that a lease of an immovable property is a transfer and even the creation of a monthly tenancy will amount to transfer. His further submission was that no industrial undertaking can be formed without premises and the very fact that premises are required for carrying on the business automatically shows that it is essential for the formation of an industrial undertaking.

4. Section 10 of the Act provides for liability to pay tax by an assessee under the head "profits and gains of business". Under sub-section (1) thereof, the tax shall be payable by an assessee under the head "profits and gains of business, profession or vocation in respect of the profits or gains of any business, profession or vocation in carried on by him". One of the exemptions from the liability to pay tax in respect of business was introduced by the provisions of section 15C which were first introduced by the Taxation Laws (Extension to Merged States) Amendment Act, 1949 (Act No. 67 of 1949). This section has been amended from time to time and the relevant provisions of this section as applicable to the assessment years 1958-59 and 1959-60 are as under :

"15C (1) Save as otherwise hereinafter provided the tax shall not be payable by an assessee on so much of the profits or gains derived from any industrial undertaking to which this section applies as do not exceed six per cent. per annum on the capital employed in the undertaking, computed in accordance with such rules as may be made in this behalf by the Central Board of Revenue, (2) This section applies to any industrial undertaking which -

(i) is not formed by the splitting up, or the reconstruction, of business already in existence or by the transfer to a new business of building, machinery or plant previously used in any other business....."

5. The object of this section is to encourage establishment of new industrial undertakings. The profits of the industrial undertaking to which the section applies are exempt from tax to the extent of 6 per cent per annum on the capital employed in the undertaking. Rules have been framed for computing the capital employed.

6. The scheme of the section is to encourage new industrial undertakings provided they fulfil the conditions mentioned in the various clauses of the sub-section. In order to be entitled to exemption an assessee must strictly come within the terms of the provisions under which such exemption is

being claimed, but in construing the provisions of this section, one must construe the said section reasonably in the context of the purpose for which the section has been introduced. It is a well-settled

canon

of construction that the provision relating to exemption must as far as possible be liberally construed and in favour of the assessee provided in doing so no violence was being done to the language used. See *Commissioner of Income-tax v. Gaekwar Foam and Runner Co*¹.

7. Question that arises for consideration depends upon the proper construction of the provisions of clause (i) of sub-section (2) of section 15C. As provided in that section, the relief under section 15C (1) is available to any industrial undertaking which is not formed : (i) by splitting up; or (ii) by reconstruction of business already in existence; or (iii) by the transfer to a new business of plant or machinery or building previously used in any other business. In the present case, there is no question of transfer of machinery or plant previously used in any other business to a new business. The assessee-company when it formed the industrial undertaking, did so by establishing its factory in a godown belonging to Messers. Pure Products & Madhu Canning Ltd. and which was used by the latter company as its godown for business purposes. They took an area of about 2,000 sq. ft. and agreed to pay monthly rent of Rs. 1,500. The argument of Mr. Dastur on behalf of the assessee is that the words "by transfer to a new business of building..... previously used in any other business" are attracted or applicable when an assessee transfers to a new business of his own his building which was previously used by him in his other business. Reliance was placed by him in support of this contention upon a decision of the Calcutta High Court in the case of *commissioner of Income-tax v. Sainthia Rice and Oil*² The provisions of section 15C (2) (i) were construed in this case and the Calcutta High Court took the view that the exemption from tax under section 15C of the Indian Income-tax Act, 1922, allowable to a newly established undertaking, applies, inter alia, as provided in sub-section (2) (i) to any industrial undertaking or plant previously used in any other business. Having regard to the facts of the case, it took the view tht the acquisition of a part of the machinery in second hand from open market by an assessee would not disentitle it to exemption under section 15C (2) (i). The view taken was that what was being aimed at was to prevent exemption to those industrial undertakings which were formed by splitting up or by reconstruction or by transfer to a new business of building, plant and machinery of the old business. While arriving at this conclusion, the High Court construed the meaning of the word "transfer", at page 781, as under :

"The expression 'transfer' is used in varying sense in different statues depending on the context. In a broad sense, it will certainly include an acqisiting of an asset by one person from whatever source. But the scheme of the section indicates that what is being aimed as is to prevent exemption to those industria undertakings which are formed by the splitting

up or by reconstruction or by transfer to a new business, of plant or machinery of the old business. The transfer, in our opinion, in this context, must mean a transfer of plant which is essential for the formation of a new industrial undertaking and that must again mean a transfer to the new business of the transferee of any machinery used by the said transferee in his old business."

8. Undoubtedly, these observations go to support the contention urged by Mr. Dastur. The whole basis of his argument is that in clause (i) of sub-section (2) reference has been made to the formation of an industrial undertaking in three different manners : (1) by splitting up; (2) by the reconstruction of the business already in existence; and (3) by the transfer to a new business of building, machinery or plant previously used in any other business. The argument on behalf of the assessee was that each one of these words indicates that it is the business of the assessee which is either split up or reconstructed or is formed by transfer to his new business of building, plant or machinery previously used by him in his other business. Undoubtedly, when the words used are susceptible of more than one construction, the construction favourable to an assessee has to be adopted. But, in the present case, the words are clear and explicit and are not capable of more than one construction unless some new words are added for the purpose of bringing out the contention urged. Nowhere in the language of clause (i) of sub-section (2) has any reference been made to the ownership of the undertaking which is formed by splitting up or by reconstruction or by transfer to any new business of building, etc. In the present case, we are not concerned with a case of splitting up or reconstruction of a business. The facts of the present case merely show that the assessee-company started its industrial undertaking in a factory located in a godown which was previously used by Pre products & Madhu Canning Ltd. for the purpose of its business. This godown was not purchased by the assessee-company, but was taken merely as a monthly tenant. Ordinarily, the words "transfer of property" as understood under the Transfer of Property Act may mean, "an act by which a living person conveys property, in present or in future, to one or more other living persons or to himself or to himself and one or more other living persons". There is nothing in the wording of clause (i) to indicate that the normal meaning of the words "transfer of property" was intended to be excluded from its operation.

9. On behalf of the revenue reliance was placed upon the decision of the Punjab High Court in *Phagoo Mal Sant Ram v. Commissioner of Income-tax*³ The view taken by the Punjab High Court is that the exemption given by section 15C of the Act in respect of a new industrial undertaking will not be available where the undertaking is formed by transfer to the new business of machinery previously used in any other business of the assessee himself or another from whom the assessee has acquired the machinery. Upon construction of the provisions of clause (i) of sub-section (2) of the section, the High Court observes :

"..... there is nothing in clause (i) of sub-section (2) of section 15C which limits 'the

transfer' as referred to therein to the act of the transferor alone to his own new business. The expression is used in its ordinary meaning and covers the case of such person is also another person purchasing building, machinery or plant for setting up his new business in the shape of an industrial undertaking. Clause (i) of sub-section (2) of section 15C first refers to splitting up of an industrial undertaking which can be : (i) by its owner for the time being under his own control, (ii) by its owner by the disposal of a part of his industrial undertaking to another person. Similar result can follow also in the reconstruction of an already existing business. the position is not different so far as the third part referring to 'the transfer to a new business of building, machinery or plant previously used in any other business is concerned. There is no justification for confining this part to the owner as transferring to as new business any building, plant or machinery previously used by him in his any other business. He, may do that. The same result may come about by another person making a purchase of the previously used building, machinery or plant in the business of the vendor, then that other person sets up his own industrial undertaking with such previously used building, machinery or plant."

10. The Punjab High Court has observed that the view which was taken by them was in consonance with *Steelsworth Ltd. v. Commissioner of Income-tax* ([1968] 69 I. T. R. 366, 370 (Assam)). It appears to us that the construction put by the Punjab High court on the provisions of clause (i) of sub-section (2) of section 15C is the proper construction. The construction adopted by the Calcutta High Court, which is cancelled by Mr. Dastur, requires addition of certain words. There which was previously used in another business, must be that of the assessee. Both the Calcutta High Court and the Punjab High Court have taken the view which is comprehensive enough to include a case where the new business as well as old business are owned by the same persons. But the language of clause (i) is not merely restricted to cases like this. It can equally be attracted when the old business is carried by an assessee while forming an industrial undertaking. in our view, it is not possible to restrict the operation of section 15C (2) (i) to a case of an assessee transferring to the new business of his own, his building, plant or machinery which was previously used by him in his other business.

11. It was urged on behalf of the assessee that the view taken by the Punjab High Court in the above case in so far as it relates to a reconstruction of the business is contrary to the one taken by this court in the case of *Commissioner of Income-tax v. Gaekwar Foam & Rubber Co⁴*. In this case it was not the contention on behalf of the revenue that it was the case of an undertaking formed by splitting up of a business already in existence nor was it a case of an undertaking formed by a transfer to new business of building, machinery or plant used in the business which was being carried on before April 1, 1948. (This case was prior to the amendment of clause (i) of sub-section (2) above referred to). The only argument on behalf of the revenue was that it was a

case of reconstruction of a newly established industrial undertaking formed by reconstruction this court tried to analyse what reconstruction of a business already in existence. While dealing with this contention this court tried to analyse what reconstruction of a business or an industrial undertaking means. As observed at page 669 the reconstruction of a business or an industrial undertaking must necessarily involve the concept that the original business or undertaking is not to cease functioning and its identity not to be lost or abandoned. the concept essentially rests on changes but the changes must be constructive and not destruction. There must be something position the whole matter as opposed to negative. The underlying idea of a reconstruction evidently must be-and this is brought out by the section itself - of a business already in existence. There must be a continuation of the activities and business of the same industrial undertaking. The undertaking must continue to carry on the same business though in some altered or varied for,. if the alterations and changes are substantial, there would be little scope for describing what emerges as a reconstruction of the business. Thus, for instance, if the ownership of a business or an undertaking changes hands not ostensibly, but in reality and effectively, that would not be reconstruction or if the very nature of the business is changed, that again would not be reconstruction. On the other hand, reorganisation of the business on sounder lines or alterations in the mode or method or scope of the activities of the business or in its personnel or infusion of new blood in the management or control of the business which may even be by some changes in the constitution of persons interested in the undertaking would certainly be no more than reconstruction of the business if it is substantially the same business carried on by substantially the same persons. These observations show that even a change in constitution of the persons interested in the undertaking is not sufficient to take it out of a case of reconstruction of a business. However, in the present case, we are not concerned with the case of reconstruction. This is a case where the question to be considered is, is the industrial undertaking of the assessee company formed by transfer to a new business of building previously used in any other business? If these words are capable of including other business previously carried on by the person other than the assessee, then the ingredient will be fulfilled.

12. The next contention on behalf of the assessee was that the words "transfer to a new business of building" implied that there is a transfer of ownership of the building. The submission was that if a right or interest in or to a building, other than that of ownership, was transferred, then it cannot be regarded as falling within the ambit of these words. The argument was that when a monthly tenancy is created the entire bundle of rights which go to constitute ownership are not transferred, but some limited rights like right to enjoy the property is carved out and is transferred. It was said that the section can only apply when the entire bundle of rights constituting ownership are transferred and not in any other case. Neither in the Transfer of Property Act nor in the Income-tax Act, the word "building" has been defined. The word "building" ordinarily is not the only thing which is the subject-matter of the ownership but

includes also dominion or the right of the ownership or of partial ownership. It is most comprehensive of all terms which can be used inasmuch as it is indicative and descriptive of every possible interest which the party can have. Ordinary modes of transfer as referred to in the Transfer of Property Act are sale, mortgage, lease, gift and exchange. In the case of sale, gift and exchange there may be complete transfer of ownership. But, in the other two cases of transfers, namely, mortgage or lease, the entire bundle or rights that go to constitute ownership are not transferred but some limited rights or interest in or to the property are transferred. Even in the case of mortgage or lease of immovable property, it is well-settled that it is a transfer of property. The words "transfer to a new business of building" cannot, therefore, be restricted to a case "where full rights of ownership are transferred", but they will be wide enough to include within their scope cases where even rights or interest to or in such building is created. A lease of an immovable property as defined under the Transfer of Property Act for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, the consideration under this definition may also take the shape of a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer of such terms..." used in clause (i) of sub-section (2) of section 15C are wide enough to include cases where a transfer is created by creation of a lease in a building in favour of the new business or the person carrying on the new business.

13. Reliance was placed on behalf of the assessee upon the provisions of section 80 and 114 of the Income-tax Act, 1961. These provisions relate to deduction in respect of capital gains. In both these sections, reference is made to capital gains relating to capital assets being building or lands or any rights in building or lands. The argument was that whenever the legislature intended to include rights other than ownership to be subjected to tax it not merely used the words "building or lands" but also used the words "any rights in building or lands". It is undoubtedly true that, in both these sections the words "any rights in buildings or lands" are used in addition to the words "buildings or lands", but the existence of these words is not sufficient to persuade us to take the view that the legislature when it used the word "building" in clause (i) of sub-section (2) section 15C wanted to depart from the normal connotation of what a building will mean. Ordinarily, the word "building" will include not only the full rights or ownership, but any right to or interest in a building.

14. It was then urged on behalf of the assessee that the intention of the legislature was to exclude a building taken on rent or lease from the connotation of the word "building" and for that purpose reliance was placed upon the provisions of section 80J(4)(ii). This section provides for deduction in respect of profits and gains from newly established industrial undertaking or ships or hotel business in certain cases. Sub-section (4) thereof is as under :

" (4) This section applies to any industrial undertaking which fulfills all the following

conditions namely :-

(ii) it is not formed by the transfer to a new business of a building (not being a building taken on rent or lease), machinery or plant previously used for any purpose.

15. The argument on behalf of the assessee was that even when section 15C (2) was enacted, it was the intention of the legislature to exclude from the scope of the word "building" a building taken on rent or lease and that intention was made clear by way of abundant caution when provisions were made under section 80J(4)(ii). If regard be had to the history of legislation in relation to the relief in respect of profits and gains of industrial undertakings or ships or hotel business, the contention does not appear to be well-founded. In the provisions of clause (i) of sub-section (2) of section 15C, as applicable to the relevant assessment years, after the word "building", the words "not being a building taken on rent or lease" are not to be found. When the Income-tax Act, 1961, was initially enacted provision for reliefs in respect of newly established industrial undertakings or hotel was introduced in section 84. Sub-section (1) of this section provided for relief to be granted to the extent of six per cent. per annum on the capital employed in the undertaking or hotel, computed in the prescribed manner. Sub-section (2) thereof provided for the industrial undertakings to which the provisions of sub-section (1) were applicable. One of the conditions to be fulfilled by the industrial undertaking was that it is not formed by the transfer to a new business of a building, machinery or plant previously used for any purpose. The phraseology here used was substantially the same as was used in clause (i) of sub-section (2) of section 15C. Sub-section (3) of section 84 provided for the cases in which the provisions of the section will be applicable to any hotel. Clause (a) of sub-section (3) of this section provided that the hotel must start functioning on or after the 1st day of April, 1961, and must not be formed by the splitting up, or the reconstruction, of business already in existence or by the transfer to a new business of building, machinery, or plant previously used for any purpose. For the purpose of the present case, the language used in clause (a) was similar to the language used in clause (i) of sub-section (2) of section 15C. However, a specific provision was made in respect of hotels in section 84 by clause (c) in sub-section (3). That clause requires that the hotel is run in premises which are owned by the company. Thus, whenever it was the intention of the legislature that the relief should be available to a hotel, one of the conditions, of the legislature that the relief should be available to a hotel, one of the conditions prescribed was that it is run in premises which are owned by the company. Later on, the provisions were amended and the requirements that the hotel is run in the premises which are owned by the company was deleted. When amendment was made in the provisions of section 84 relating to the income of the newly established undertaking or hotel (by Finance (No. 2) Act of 1967) the requirement that the hotel is run in premises which are owned by the company was deleted. Even when these provisions were ultimately modified and section 80J was introduced for giving deductions in respect of profits

and gains from newly established for giving deductions in respect of profits and gains from newly established undertakings or ships of hotel business in certain cases the requirement that the hotel is run in the premises owned by the company is deleted. The provisions of section 80J, if analysed in respect of an industrial undertaking and in respect of a business of any hotel, will clearly go to show that by merely using the word "building" it was not the intention of the legislature to exclude from its scope a building taken on rent or lease. Sub-section (4) of section 80J deals with cases when the provisions of sub-section provides that it is not formed by the transfer to a new business of a building (not being a building taken on rent or lease), machinery or plant previously used for any purpose. By using the words "not being a building taken on rent or lease", a modification was intended to be made by the legislature in respect of cases covered by clause (i) of sub-section (2) of section 15C of the Indian Income-tax Act, 1922. Undoubtedly, as the section stood, it worked hardship. If the building was taken on licence, then there was no transfer of building and in such a case an industrial undertaking, though it may be liable to pay compensation, will not be deprived of the relief granted by sub-section (1) of section 15C. However, if a right or interest therein in the nature of a tenancy right was created, the relief granted by sub-section (1) was taken away. In section 80J when conditions are prescribed by sub-section (6) (c) in respect of business of a hotel for application of the provisions of sub-section (1) it is, inter alia, provided that the business of the hotel is not formed by the splitting up, or the reconstruction, of a business already in existence or by the transfer to a new business of a building previously used as a hotel or of any machinery or plant previously used as a hotel or of any machinery or plant previously used for any purpose. Thus, in the case of a hotel even a building taken on rent or lease was not sought to be excluded. This difference in the provisions of sub-sections (4) and (6) clearly indicates that by the mere use of the word "building" it was not intended to include within its scope the full bundle of rights constituting the ownership and to exclude therefrom a limited right in the nature of right to or interest in a building. It is, therefore, not possible to construe the words "transfer to a new business of a building" to mean "transfer to a new business of the ownership of the building".

16. The next contention on behalf of the assessee was that in the present case, there was merely a monthly tenancy and the month tenancy is not a lease. Such contention has to be rejected. A lease of an immovable property may be for a certain time, express or implied, or in perpetuity. A monthly tenancy of a building is a lease from month to month until it is duly terminated in the manner provided by section 111 of the Transfer of Property Act. A monthly lease of a building is a lease of a property of which the duration is from month to month until duly terminated. It does not cease to be transfer by way of lease.

17. The last contention urged on behalf of the assessee was that in the present case, the assessee-company required for the purpose of its business about 2,000 sq. ft. area; that it was not

necessary for it to hire a building or structure of a specific type for its formation. Omitting the relevant words in section 15C (2) it provides that this section applies to any industrial undertaking which is not formed by the transfer to a new business of building previously used in any other business. The industrial undertaking can never be formed unless it has building, whatever may be its shape, size or form is essential for the formation of an industrial undertaking. The section does not require that special types of building required for particular undertakings are only to be included. The object is to grant relief to a new industrial undertaking and it cannot be started unless it has for its formation a building, where it can carry on its undertaking. Thus, the building was essential for its formation.

18. Our answer to the question referred to us is in the affirmative. The assessee shall pay the costs of the revenue.

19. Question answered in the affirmative.

Cases Referred.

1([1959] 35 I. T. R. 662 (Bom.) at page 673

2Mills ([1971] 82 I. T. R. 778 (Cal)

3([1969] 74 I. T. R. 734, 737 (Punj)

4([1959] 35 I. T. R. 662 (Bom)

