BOMBAY HIGH COURT

Commissioner of Surtax

Vs

Ballarpur Industries Ltd

(Desai and R Kantawala, JJ.)

16.06.1978

JUDGMENT

Desai, J.

1. In this reference the following question of law has been referred at the instance of the Commissioner of Surtax, Vidarbha and Marathwada, Nagpur, for our consideration :

> "Whether, on the facts and in the circumstances of the case, the amount in proportion to the relief allowed to the assessee under section 80-I of the Income-tax Act in the corresponding assessment to income-tax had to be deducted in determining the capital of the assessee-company as at July 1, 1969, for the purpose of assessment to surtax for the assessment year 1971-72 ?"

2. The assessee before us is Ballarpur Industries Ltd., previously known as Ballarpur Paper and Straw Board Mills Ltd., Ballarpur. We are concerned with their liability to surtax for the assessment year 1971-72. The chargeable period for the said assessment was the year ended 30th June, 1970, and the capital for the purpose of determining the standard deduction was thus required to be determined as on 1st July, 1969. The assessee had initially filed the return and thereafter revised the same. In its return the assessee in working out the capital base as on 1st July, 1969, did not make any adjustment for the relief admissible to it as deduction under s. 80-I of the I.T. Act, 1961. The ITO was of the view that having regard to r. 4 of the Second Schedule of the Companies (Profits) Surtax Act, 1964, the amount proportionate to the deduction allowable under s. 80-I could not form part of the capital base for arriving at the standard deduction at 10% therefore. The ITO, therefore, worked out the amount of deduction admissible under s. 80-I and deducted the amount so worked out from the capital of the company as shown by the assessee. Being aggrieved by the order of the ITO reducing the capital by the amount proportionate to the deduction admissible under s. 80-I of the I.T. Act, 1961, the assessee preferred an appeal before the AAC. The AAC confirmed the approach and action of the ITO

reducing the capital of the company in proportion to the amount of deduction admissible under s. 80-I. Being aggrieved, the assessee carried the matter in further appeal to the Tribunal. The Tribunal considered the language of r. 4 and, fortified by the decision of a single judge of the Karnataka High Court in *Stumpp Schuele & Somappa P. Ltd. v. Second ITO*[1] accepted the contention of the assessee and allowed the appeal, directing that the amount of deduction permissible by reason of the provision contained in s. 80-I should not be deducted in determining the amount of capital of the assessee-company on the relevant date. It is this conclusion of the Tribunal which has been assailed by the Commissioner in this reference.

3. Under the Companies (Profits) Surtax Act, 1964, "statutory deduction" is defined by s. 2(8); it means an amount equal to ten per cent. of the capital of the company as computed in accordance with the provisions of the Second Schedule, or an amount of two hundred thousand rupees, whichever is greater. We are not concerned with the two provisos to the said section. The Second Schedule to the Act thus contains rules for computing the capital of a company for the purposes of surtax. We are concerned with r. 4 of the Second Schedule, which is in the following words :

> "4. Where a part of the income, profits and gains of a company is not includible in its total income as computed under the Income-tax Act, its capital shall be the sum ascertained in accordance with rules 1, 2 and 3, diminished by an amount which bears to that sum the same proportion as the amount of the aforesaid income, profits and gains bears to the total amount of its income, profits and gains."

4. In considering and applying the provisions of r. 4 we are concerned with what part of the income of the assessee can be regarded as "not includible in its total income as computed under the I.T. Act" ? On behalf of the assessee it has been submitted that incomes which do not form part of its total income as indicated in Chap. III of the Act alone would be covered by this provision and not the deductions allowed to the assessee under Chap. VIA.

5. Chap. III of the I.T. Act, 1961, bears the chapter heading "Incomes which do not form part of total income". We are principally concerned with ss. 10 and 11 which provide that certain types of income "shall not be included in the total income of a person".

6. S. 80A is the opening section of Chap. VI-A which bears the chapter heading "Deductions to be made in computing total income". Sub-s. (1) of s. 80A read as follows :

> "In computing the total income of an assessee, there shall be allowed from his gross total income, in accordance with and subject to the provisions of this Chapter, the deductions specified in section 80C to 80U."

7. Before considering the rival contentions and the judgments to which our attention was drawn

at the bar, we may note also that s. 80B in Chap. VI-A contains certain definitions but which by the opening words of the section are restricted for the purposes of that chapter only. Our attention was drawn by counsel for the Commissioner to the definition of "gross total income" contained in s. 80B(5), which reads as follows :

> "'gross total income' means the total income computed in accordance with the provisions of this Act, before making any deduction under this Chapter or under section 280-O."

8. In order to deal with the rival contentions a brief legislature history of the Surtax Act and the provisions of the I.T. Act, 1961, may be given. The Surtax Act was enacted in the year 1964 in order to impose a special tax on companies on their excess profits. Chap. VI-A originally did not exist in the I.T. Act, 1961, and it was introduced for the first time in the year 1965 by the Finance Act 10 of 1965. However, there existed Chap. VII which bore the chapter heading "Incomes forming part of total income on which no income-tax is payable". It may be mentioned that Chap. VI-A as originally enacted in 1965 was later on substituted by the new Chap. VI-A by the Finance (No. 2) Act, 1967, containing ss. 80A to 80G. Section 80U was added therein by Act 19 of 1968. Sections 80-I and 80J were enacted by the Finance (No. 2) Act, 1967.

9. In this reference, we are concerned with the deduction allowable under s. 80-I which was one for priority industries. The topic covered by the section, it may be noted, was originally dealt with by s. 80E, which was later on replaced by s. 80-I and finally deleted by the Finance Act of 1972 with effect from 1st April, 1973. The deduction was in respect of priority industries. There was another deduction allowed under s. 80J in respect of profits and gains from newly established industrial undertakings. Similar relief was, prior to 1967, provided to the assessees by s. 84 which formed part of Chapter VII to which reference may now be made.

10. Section 84 came to be considered by our High Court in *CIT v. Century Spg. and Mfg. Co. Ltd*[2]. in connection with the Surtax Act and the very provisions of the latter Act with which we are concerned. After setting out (at page 18 of the report) the provisions of r. 4, it was observed that the provisions of r. 4 of the Second Schedule will be attracted only if a part of the income, profits and gains of a company is includible in its total income. It was observed, after noting the Chapter headings of Chapters III and VII, that there was material difference between the topics dealt with in Chapter III and those dealt with in Chapter VII. Chapter III only dealt with such items of income which do not form part of the total income whilst Chapter VII dealt with items of income which form part of total income on which no income-tax was payable. It was observed that simply because under the provisions of the said Chapter (i.e., Chapter VII) no tax was payable on a particular item of income forming part of the total income, it could not be said that such an items would not be includible in the total income. It was clearly laid down that if a part of the income was includible in the total income under the I. T. Act, then the provisions of r. 4

would be attracted. The judgment concludes with the observation that normally the provisions of r. 4 of the Second Schedule would be applicable only to items of income which are included in Chapter III which do not form part of the total income. Thus, the answer given by the court was that the deduction available to a new industrial undertaking under s. 84, which occurred in Chapter VII, would not attract the provisions of r. 4 of the Second Schedule to the Surtax Act.

11. It is true that the above decision was given with respect to the relief given to new industrial undertakings by s. 84, which has now been deleted and substituted by s. 80J which finds its place in Chapter VII. The question is whether the change has resulted in any variation in the effect to be given to r. 4 in the Second Schedule of the Surtax Act. The question came directly to be considered by the Karnataka High Court originally by a single judge, whose decisions is reported in Stumpp, *Schuele & Somappa P. Ltd. v. Second ITO*[3] which decision was subsequently confirmed by a Division Bench of the very same court in Second *ITO v. Stumpp. Schuele & Somappa P. Ltd*[4]. The learned single judge in a very exhaustive and considered judgment has noted all the relevant facts and observed ([1976] 102 ITR 320, 325) :

> "The expression 'not includible' means not capable of being included. It cannot refer to an amount which already forms part of the gross total income and which would be later on deducted for purposes of determining the tax liability under Chapter VI-A."

12. It was further observed (pp. 325, 326) :

> "It is significant that the expression 'shall not be included', which is found in ss. 10 and 11 which are in Chapter III, the title of which is 'incomes which do not form part of total income', is not used in any of the provisions contained in ss. 80C to 80U. Similarly, the said expression is not used in Chapter IV of the Income-tax Act providing for the method of computation of the income under which the assessee is allowed deductions by way of expenses, rebates, allowances, etc. Both in Chapter IV and Chapter VI-A, Parliament has consistently used the words 'deduction shall be allowed' and not the expression 'shall not be included'."

13. Later on, at page 326 of the report, the learned single judge observed :

> "It is, therefore, clear that the expression 'income, profits and gains of a company not includible in its total income as computed under the Income-tax Act' refers to those sums which are not includible in the total income by the provisions of Chapter III of the Income-tax Act and does not refer to any of the deductions claimable under Chapter VI-A of the Income-tax Act."

14. When the matter was carried in appeal by the revenue, the approach and the conclusions of

the learned single judge were confirmed by the Division Bench. Before the Divisions Bench the revenue also tried to rely on the definition of "gross total income" defined under s. 80B, and the contention based on the definition was rightly rejected, the court observing that that definition was only for the purposes of Chapter VI-A of the I.T. Act and had no bearing on the interpretation to be placed on r. 4 of the Second Schedule (see page 406 of the report). Both the learned single judge and the Division Bench of the Karnataka High Court derived assistance and support for their conclusions from the other rules of the Second Schedule as also the notes provided. In our opinion, it is unnecessary to refer to these as the language of the provisions under consideration is quite clear. In accordance with the view taken by our High Court (dealing with s. 84) and in accordance with the views expressed by the Karnataka High Court, the adjustment required to be made under r. 4 is not in respect of deductions or reliefs from total income allowed under Chapter VI-A or under Chapter VII originally, but is only in respect of incomes excluded from total income under Chapter III. If that be the correct view, and in our opinion, this is the correct view, then the conclusion reached by the Tribunal is in order and the contention advanced contrary thereto by counsel for the Commissioner is required to be rejected.

15. In the result, the question referred to us is answered in the negative and in favour of the assessee.

16. The Commissioner will pay to the assessee the costs of this reference.

Cases Referred.

1[1976] 102 ITR 320
2[1978] 111 ITR 6 (Bom)
3[1976] 102 ITR 320 (Ker)
4[1977] 106 ITR 399 (Kar)