BOMBAY HIGH COURT

Commissioner of Income-Tax

Vs

N.U.C. Private Ltd

(M Chandurkar, C.J. Sawant, J.)

21.04.1980

JUDGMENT

Sawant, J.

1. This is a reference by the Tribunal under s. 256(1) of the I.T. Act, 1961 (hereinafter referred to as "the Act"). The short question that falls for our consideration is :

> "Whether the assessee-company is an 'industrial company' within the meaning of cl. (d) of sub-s. (7) of s. 2 of Chap. II of the Finance Act, 1966 ?"

2. The assessee which is a private limited company engaged in business, as disclosed in its memorandum and articles of association, among other things, of undertaking, building, constructing, erecting, planting, executing, carrying out, improving repairing, enlarging, etc., of factories. We are concerned in this reference with the assessment year 1966-67, and during the year under consideration, it had constructed factories for various large concerns. Admittedly, further, the company declared dividends to the extent of 64% of its net distributable income. It was the case of the company before the ITO that it was entitled to exemption from the levy of super-tax as provided under s. 104 of the Act since it was an industrial company and had distributed more than 45% of its total profits and gains as dividends within the 12 months immediately following the expiry of the previous year. The ITO held that the assessee-company was not an industrial company and could not claim such exemption unless it had declared 90% of such profits as dividends. He, therefore, applied the rate of 65% in the present case.

3. Against the said decision, the assessee appealed and the AAC held that the activity of the construction of building was in the nature of manufacturing or processing of goods and, therefore, the assessee was an industrial company for the purposes of s. 109(iii) of the Act. Hence, he directed the ITO to treat the assessee as an industrial company and levy tax accordingly.

4. Being aggrieved by the said decision the revenue preferred an appeal to the Tribunal and the Tribunal took the view that the manufacture of window and door frames and concrete slabs and beams by the assessee-company was directly related to the actual business of the company., i.e., of "production or construction of buildings". Therefore, the assessee did carry on the business of manufacture of goods like window and door frames and concrete slabs and beams used in its main business, and the said business did involve manufacture and processing of goods. The Tribunal, therefore, held that the assessee-company was covered by s. 109(iii) of the Act and hence the company having declared more than 45% as net dividend it was exempt from levy of super-tax at a higher rate of 65%. The revenue, therefore, made an application for referring the following question to this court, viz. : "Whether, on the facts and in the circumstances of the case, it has been rightly held that the assessee was an 'industrial company 'within the meaning of the said expression as defined in s. 2(7)(d) of Chapter II of the Finance Act, 1966 ?" That is how the said question has been referred to this court, as stated earlier, by the Tribunal under s. 256(1) of the Act.

5. There is no dispute on the facts as found by the Tribunal that the only business that the assessee-company carries on is that of construction and repair of buildings and that it is in the process of and for the purpose of the said construction and repair of buildings that it manufactures window and door frames and concrete beams and slabs. It is also not in dispute that the said manufacture of window and door frames and concrete beams and slabs is for the purpose of the particular buildings under construction or repairs. The said frames, slabs and beams are neither manufactured nor sold independently of the buildings. This being the position, we are of the view that the whole approach of the Tribunal in treating the frames, etc., as goods like any other goods which are independently manufactured and sold in the market, is erroneous. We also find from the discussion of the Tribunal in its judgment that the Tribunal has mainly relied upon the general definition of industrial undertakings for coming to its conclusion, completely ignoring the special definition given of "industrial company" in cl. (d) of sub-s. 2 of Chap. II of the Finance Act, 1966, which directly falls for consideration in the present case. It will, therefore, be convenient to reproduce the said definition which is as follows (See[1966] 60 ITR (St.) 17, 19) "'Industrial company' means a company which is mainly engaged in the business of generation or distribution of electricity or any other form of power or in the construction of ships or in the manufacture or processing of goods or in mining."

6. A persual of the said definition makes two things clear. Firstly, it makes a distinction between the activities of "construction" and of "manufacture or processing". Secondly, it covers only that construction company which is engaged in the construction companies. It should, therefore, be obvious to anyone that the Legislature has clearly indicated that it does not want to include in the said definition a company which is engaged mainly or otherwise in the construction of anything

other than ships. Prima facie, therefore, a company such as the assessee, whose business is to construct and/or repair buildings and factories will not be covered by the said definition. We should have, therefore, thought that the said definition being clear and unambiguous, there was no difficulty in holding that the assessee-company did not fall within the said definition. However, as has been pointed out earlier, the Tribunal has ignored the manifest implications of the said definition and by relying on the expression "in the manufacture or processing of goods" contained in the said definition, has tried to fit the assessee-company in the said definition. For doing this, further, it has artificially divided the business of the assessee into two parts, viz., the manufacture of door and window frames and concrete slabs, and the construction and repair of the buildings for which the said manufacture is done. As stated earlier, the making of door and window frames and of the concrete beams and slabs is admittedly in the process of the construction and repair of the buildings themselves. There is, therefore, no scope for dividing the business of the company into the said two parts, for neither the frames not the slabs nor beams are manufactured or prepared independently of the buildings or sold as such in the market. It is this basic error which led the Tribunal to its incorrect conclusion.

7. Shri Khatri, the learned counsel for the assessee, however relied upon a decision of the Orissa High Court reported in *CIT v. N C Budharaja and Co*[1]. in support of his contention that the expression "industrial undertaking" has to be given its wider meaning, and so construed it will not exclude industrial undertaking which manufactured or produced articles. The word "article" according to him would cover any commodity or goods or property and its meaning need not be confined to movable property. In this sense, even a dam would be an article. There is no doubt that in the aforesaid decision the Orissa High Court has in terms made observations to the above effect. However, it must be remembered that the Orissa High Court in that case was called upon to interpret the expression "industrial undertaking" in s. 80HH of the Act. The court found that there was no statutory definition given of the said expression anywhere in the Act and, therefore, it had to fall back upon the general definition of an industrial undertaking. For that purpose, the court firstly, referred to the definition given in the Shorter Oxford English Dictionary and then to the definition of the said expression given in the Industrial Disputes Act, 1947. It is by reference to the definitions given in the said dictionary and the said Act that the court there concluded that the assessee-firms which had undertaken construction of an irrigation project were industrial undertakings. To come to its said conclusion the court also relied upon the finding of fact recorded by the Tribunal that the assessee had undertaken manufacture of certain materials which it ultimately utilised in the construction of the dam. The court, therefore, held that there was no warrant for the submission of the revenue that the dam would not be an article. The court in this connection observed that, in the absence of a statutory definition, it would be open to look for the meaning by reference to the definition in the sister legislations and failing that to adopt the

meaning in common parlance. According to the court, the concept of industrial undertaking need not necessarily be confined to manufacture and production of articles, and even in the absence of either of them, in the strict sense, there could be an industrial undertaking. The business of a contractor, who has undertaken the construction of an irrigation project would thus, according to the court, be an industrial undertaking for the purposes of the Industrial Disputes Act, 1947.

8. It is not necessary for us to make any comments upon the aforesaid decision for the simple reason that we are not left in the present case without a statutory definition of the expression "industrial company". There is, therefore, no need for us to fall back upon either the use of the expression in common parlance or its definition in the sister legislations. As has been pointed out earlier, the expression "industrial company" that we are called upon to construe is the expression which has been defined in s. 2(7)(d) of Chap. II of the Finance Act, 1966. In view of the said definition, it is not open to the court to refer either to the general definition or to the definition given in the other provisions of the same statute or in other statutes. As has been stated earlier, in view of the clear and unambiguous definition of the said expression, it is beyond doubt that the assessee-company which does the business of construction and repair of buildings would not be covered by the said definition.

9. Shri Khatri then referred to the circular dated February 17, 1973, of the *Central Board of Direct Taxes reproduced in*[2] to contend that although the assessee-company was engaged in the business of construction of buildings, it was also at the same time manufacturing or processing window frames, door frames, cement beams and slabs, and the income derived by it from its overall business of construction. Hence, he contended, that in terms of the said circular which has sought to interpret the Explanation to cl. (d) of sub-s. (7) of s. 2 of Chap. II of the Finance Act, 1966, the assessee-company will be an industrial company. We fail to understand how this circular helps the assessee-company. Apart from the fact that there is nothing on record to show separately the income derived by the assessee from its so-called different activities, one of constructing buildings and the other of manufacturing frames and beams, we have already held that the assessee-company was not carrying on the said activity of manufacturing frames, etc., independently of or otherwise than in the process of, the construction of the buildings. It is not, therefore, permissible to divide its activity into the said two segments to compare the income from one with the other. The assessee-company's only business is that of construction and repairing of buildings and there are no two activities carried on by it as contended by Shri Khatri. We are, therefore, not impressed by the contention advanced by Shri Khatri that taking into consideration the said extended meaning given in the said circular the assessee-company would fall within the definition of an industrial company. It is for this reason that we are not inclined to remand the matter to the Tribunal, as was urged by Shri Khatri, to find out the separate incomes of the assessee-company form the said so-called two sources or activities. In the result, we are of

the view that the Tribunal has clearly erred in law in holding that the assessee-company fell within the definition of "industrial company" as given in s. 2(7) (d) of Chap. II of the Finance Act, 1966.

10. We, therefore, answer the question referred to us in the negative and against the assessee. The assessee to pay the

Cases Referred.

1[1980] 121 ITR 212
2[1973] 88 ITR (St.) 80