

THE COMMISSIONER OF INCOME TAX

v.

M/S. NARANG DAIRY PRODUCTS

FEBRUARY 28, 1996

[B.P. JEEVAN RADDY AND K.S. PARIPOORNAN, JJ]

Income Tax Act, 1961 : Sections 2(47), 33(1)(a) and 34(3)(b)

Development rebate—Granted for entire machinery owned by assessee and used for its business—Subsequently part of machinery sold and remaining leased out—Within prohibited statutory period—Consequently entire development rebate withdrawn—Held : such lease covered by expression "otherwise transferred"—Hence, withdrawal of entire development rebate justified.

Development rebate—Entitlement to—Conditions for—Held : Machinery or plant must not only be owned but also exclusively used by assessee for the business.

Words and Phrases :

"Transfer"—"Otherwise transferred"—Meaning of—In the context of Section 34(3)(b) of the Income Tax Act, 1961.

The respondent-assessee was a registered firm. In respect of its assessment for the assessment year 1965-66, the Income Tax Officer allowed development rebate for the entire machinery and plant owned by it. A part of the machinery was subsequently sold and the machinery that was left was let out by the assessee on lease. In the circumstances, the Income Tax Officer withdrew the development rebate. The appeal filed by the assessee was dismissed by the Appellant Assistant Commissioner. Its further appeal was allowed by Income Tax Appellate Tribunal. It also refused the Revenue's application for reference to the High Court. Therefore Revenue filed an application under S. 256(2) before the High Court, which was also dismissed. Hence this appeal.

On behalf of the Revenue it was contended that by entering into the lease transaction the assessee had "otherwise transferred" the machinery or plant before the expiry of eight years as prescribed by Section 34(3)(b) of the Income Tax Act, 1961 from the year of acquisition and installation

and, therefore, the withdrawal of development allowance was justified.

On behalf of the assessee it was contended that under Section 34(3)(b) read with Section 2(47) of the Act this was not a case of any "sale" or "transfer otherwise" extinguishing its rights in the machinery or plant.

Allowing the appeal, this Court

HELD : 1. It is not only the ownership of the plant or machinery, but also its exclusive user by the assessee for the purpose of its business, that is essential to enable the assessee to get the development rebate under Section 33(1)(a) of the Income Tax Act, 1961. In cases where an assessee disables himself for such continued exclusive user of the plant or machinery for the specified period, the consequences specified in Section 34(3)(b) of the Act will follow, provided the machinery or plant is "otherwise transferred". It is true that there is no sale; nor is there any complete extinguishment of the right of the assessee in the machinery or plant by the grant of lease; but the exclusive possession and enjoyment of the machinery or plant by the assessee no longer exists or survives. It is a case where the machinery or plant is "otherwise transferred" by the assessee to any person before the expiry of eight years from the end of previous year in which it was acquired. Even assuming that the transaction may not be a "transfer" as defined under Section 2(47) of the Act, the definition section is an inclusive one and does not exclude the contextual or the ordinary meaning of the word, "transfer". [1174-D-G]

2. Keeping in view the purpose for which the relief by way of development rebate is afforded under Section 33(1)(a) of the Act, in cases where the machinery or plant is not used by the assessee for the purpose of business carried on by him, for the specified period, and such user is given over to another, it can be safely stated that the machinery or plant is "otherwise transferred" by the assessee to another person. Hence, the withdrawal of the development rebate by the Income Tax Officer is justified. [1175-B-C]

Blue Bay Fisheries (P) Ltd. v. Commissioner of Income Tax, 161 ITR 1, approved.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 388 (NT) of 1978.

From the Judgment and Order dated 1.8.77 of the Allahabad High

Court in I.T.A. No. 194 of 1977.

Dr. V. Gauri Shankar, Manoj Arora and S.N. Terdol for the Appellants.

Ms. S. Janani for the Respondents.

The Judgment of the Court was delivered by

PARIPOORNAN, J. The Commissioner of Income Tax, Lucknow (the Revenue) having obtained special leave of this Court in Special Leave Petition (Civil) No. 3204 of 1977 by order dated 21.2.1978, has filed the Civil Appeal against the order of Allahabad High Court dated 1.8.1977, rendered in ITA No. 194 of 1977 rejecting the application filed by the Revenue under Section 256(2) of the Income Tax Act (hereinafter referred to as the Act). The Revenue required the Income Tax Appellate Tribunal, Allahabad Bench, to refer the following question of law under Section 256(1) of the Act for the decision of the High Court :

"Whether the Tribunal was in law justified in holding that the *amendment order* made by the I.T.O. was not sustainable to the extent to which it purported to withdraw development rebate admissible to the assessee in respect of that part of the machinery/plant which was the subject matter of the *hiring agreement dated 27.8.1969*."

(emphasis supplied)

The Appellate Tribunal rejected the said application by order dated 20.10.1976. It is, thereafter the Revenue filed the application under Section 256(2) of the Act before the High Court, which was rejected by order dated 1.8.1977.

2. The facts of this case are in a narrow compass. The respondent-assessee is a registered firm. It carried on the business of manufacture of "milk powder". We are concerned herein with the assessment year 1965-66. For the said year, the Income Tax Officer, by order dated 29.6.1968, allowed development rebate for the entire machinery and plant owned by the assessee and used for the said business in the sum of Rs. 1,00,093. A part of the machinery was subsequently sold. The machinery that was left entitling the assessee to the development rebate for the said year was

determined at of Rs. 85,222. This machinery was let out by the assessee on 27.8.1969 to M/s. Hindustan Lever Limited for a period of three years with a provision for further renewal of the agreement or for outright purchase. In the circumstances, the Income Tax Officer, by an amendment order dated 30.3.1970, withdrew the development rebate of Rs. 1,00,093. The appeal filed by the assessee was dismissed by the Appellate Assistant Commissioner. In further appeal before the Income Tax Appellate Tribunal, it was contended that there was no "sale" or "transfer" within the meaning of Section 34(3)(b) of the Act, permitting withdrawal of the development rebate of Rs. 1,00,093, granted earlier and in this view the amendment order passed by the Income Tax Officer was improper and unjustified. The Appellate Tribunal followed its earlier decision rendered for the assessment year 1970-71 and held that no transfer was involved by the lease agreement and so Section 34(3)(b) of the Act was not attracted. The appeal filed by the assessee was allowed. Thereafter the Revenue required the Appellate Tribunal in RA No. 131/1976-77, to refer the question of law, formulated hereinabove for the decision of the High Court. The Tribunal declined the request of the Revenue and the application filed by the Revenue before the High Court also met with the same fate. It necessitated the Revenue to approach this Court by special leave. After obtaining special leave in SLP(C) No. 3204/77, the above appeal has been filed.

3. We heard counsel. The original assessment order for the year 1965-66 was rendered on 29.6.1968. The amendment order withdrawing the development rebate was passed by the Income Tax Officer on 30.3.1970. In view of the pendency of the matter for over two decades we intimated counsel on both sides that we propose to finally adjudicate the matter and in that behalf, we withdraw the entire matter from the High Court, to this Court.

4. It is common ground that for the year 1965-66 the assessee was allowed development rebate for the entire machinery and plant *owned and used by it* for the purpose of business in the sum of Rs. 1,00,093. Later, a part of the machinery was sold. The assessee became entitled to development rebate only in the sum of Rs. 85, 222. It is common ground that the machinery was let out by the assessee on 27.8.1969 to M/s. Hindustan Lever Limited for a period of three years with the provision for further renewal of the agreement or for outright purchase. The sole question that arises for consideration is, whether in the circumstances, Section 34(3)(b) of the

Income Tax Act is attracted enabling the Income Tax Officer to pass the amendment order as he did, dated 30.3.1970, withdrawing the development rebate of Rs. 1,00,093 ?

5. Dr. Gauri Shankar, senior counsel appearing for the appellant, submitted that by entering into the lease transaction the assessee has "otherwise transferred" the machinery or plant before the expiry of eight years from the end of the previous year in which it was acquired and installed and so the allowance made under Section 33 of the Act, in respect of the machinery or plant should be deemed to have been wrongly made for the purpose of the Act. Counsel for the assessee Smt. S. Janani, submitted that Section 34(3)(b) of the Act should be read along with the definition contained in Section 2(47) of the Act, and so read, this is not a case of any "sale" or "transfer otherwise" extinguishing the rights of the assessee in the machinery or plant.

6. It will be useful to bear in mind the relevant statutory provisions Section 2(47), Section 33 and Section 34(3)(b) applicable to the instant case :

"Section 2(47) - ("transfer", in relation to a capital asset, includes,-

- (i) the sale, exchange or relinquishment of the asset; or
- (ii) the extinguishment of any right therein; or
- (iii) the compulsory acquisition thereof under law; or
- (iv) in a case where the asset is converted by the owner thereof into, or is treated by him as, stock-in-trade of a business carried on by him, such conversion or treatment; (or)
- (v) any transaction involving the allowing of the possession of any immovable property to be taken or retained in part performance of a contract of the nature referred to in section 53A of the Transfer of Property Act, 1882 (4 of 1882); or
- (vi) any transaction (whether by way of becoming a member of, or acquiring shares in, a co-operative society, company or other association of persons or by way of any agreement or

any arrangement or in any other manner whatsoever) which has the effect of transferring, or enabling the enjoyment of, any immovable property.

Explanation - For the purposes of sub-clauses (v) and (vi), "immovable property" shall have the same meaning as in clause (d) of section 269UA;"

"33(1)(a) In respect of a new ship or new machinery or plant (other than office appliances or road transport vehicles) 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 the machinery or plant was installed or, if the ship, machinery or plant 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).

"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 (11 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:

Provided that this clause shall not apply -

(i) where the ship has been acquired or the machinery or plant has been installed before the 1st day of January, 1958; or

(ii) where the ship, machinery or plant is sold or otherwise transferred by the assessee to 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

(iii) where the sale or transfer of the ship, machinery or plant is made in connection with the amalgamation or succession, referred to in sub-section (3) or sub-section (4) of section 33.

(emphasis supplied)

7. In this case, the machinery or plant was not sold. Admittedly, the machinery was let out by the assessee to M/s. Hindustan Lever Limited on 27.8.1969, within a period of eight years from the end of the previous year in which it was acquired. The only question is whether it can be said that the machinery or plant was "otherwise transferred" by the assessee to any person. Under Section 33(1)(a) the development rebate is allowed in respect of the new machinery and plant which is owned by the assessee and *is wholly used for the purpose of business carried on by him*. When the machinery was let out by the assessee to M/s. Hindustan Lever Limited, it cannot admit of any doubt, that the said machinery or plant could not and was not used by the assessee for the purpose of business carried on by him. It is not only the ownership of the plant or machinery, but also is its exclusive user by the assessee for the purpose of his business, that is essential to enable the assessee to get the development rebate under Section 33(1)(a). In cases where an assessee disables himself from such continued exclusive user of the plant or machinery for the purpose of his business for the specified period, the consequences specified in Section 34(3)(b) will follow, provided the machinery or plant is "otherwise transferred". It is true that there is no sale; nor is there any complete extinguishment of the right of the assessee in the machinery or plant by the grant of lease; but the exclusive possession and enjoyment of the machinery or plant by the assessee no longer exists or survives. Such right to exclusive possession and enjoyment vests in the lessee and it is a case where the machinery or plant is "otherwise transferred" to the lessee. It is a case where the machinery or plant is "otherwise transferred" by the assessee to any person before the expiry of eight years from the end of previous year in which it was acquired. Even assuming that the transaction may not be a "transfer" as defined under Section 2(47) of the Act, in our view, the definition section is an inclusive one and does not exclude the contextual or the ordinary meaning of the word, "transfer". There are different shades of meaning to the word "transfer", viz., "to make over possession of to another", "a delivery of title or property from one person to another", "to displace from one surface to another", "removal", "handover", "make over

possession of property to another", "change", "displace" etc. The words "otherwise transferred" occurring in Section 34(3)(b) should bear an appropriate meaning, in the context of the main provision, Section 33(1)(a) of the Act. Section 34(3)(b) is closely linked to Section 33(1)(a) of the Act. Keeping in view the purpose, for which the relief by way of development rebate is afforded under Section 33(1)(a) of the Act, in cases where the machinery or plant is not wholly used by the assessee for the purpose of business carried on by him, for the specified period, and such user is given over to another, it can be safely stated that the machinery or plant is "otherwise transferred" by the assessee to another person. In the above view of the matter, we are of the view, that the withdrawal of the development rebate by the Income Tax Officer in the amendment order dated 30.3.1970 by relying on Section 34(3)(b) of the Act is justified. We are broadly in agreement with the decision of the Kerala High Court reported in *Blue Bay Fisheries (P) Ltd. v. Commissioner of Income-Tax*, (166 ITR 1), in the interpretation of the crucial words occurring in Section 34(3)(b) of the Act, "otherwise transferred". We set aside the decision of the Allahabad High Court and also of the Appellate Tribunal and answer the question formulated by the Revenue under Section 256(1) of the Act in the negative, in favour of the revenue and against the assessee. The appeal is accordingly allowed. There shall be no order as to costs.

Appeal allowed.