(1994) 12 BOM CK 0039

In the Bombay High Court

Case No : IT Reference No. 212 of 1984

Asmaco APPELLANT

Vs

Commissioner of Income Tax RESPONDENT

Date of Decision : 19-12-1994

Acts Referred:

Income Tax Act, 1961 — Section 143(3), 155, 155(5), 2, 2(31)
Transfer of Property Act, 1882 — Section 54

Citation : (1994) 12 BOM CK 0039

Hon'ble Judges : S.M. Jhunjhunuwala, J;B.P. Saraf, J

Bench : Division Bench

Advocate : K.B. Bhujle, for the Appellant; T.U. Khatri, P.S. Jetly and Mrs. S. Bhattacharyya, for the Respondent

Judgement

S.M. Jhunjhunuwala, J.—By this reference made u/s 256(1) of the income tax Act, 1961 (''the Act'') at the instance of the assessee, the Tribunal has referred the following question of law to this Court for opinion:

Whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that there was a ''transfer'' of assets within the meaning of section 34(3)(b) of the income tax Act, 1961?

The assessee-firm was constituted under the deed of partnership dated 29-10-1969 consisting of two partners, viz, (i) Husainbhai Ahmedali Nalwala, and (ii) Aftabbhai Nalwala. The business activities of the assessee-firm were two-fold, i.e., purchasing and reselling of plastic cloth and manufacturing of different kinds of plastic cloth in the firm name and style of Asmaco, having the factory at Thane. Under a deed of partnership dated 14-11-1975, a partnership firm comprising of the said Husainbhai Ahmedali Nalwala, the said Aftabbhai Nalwala and one H.A. Nalwala Family Trust as partners therein was constituted in the firm name and style of ''Asmaco Plastic Industries'' on the terms and conditions contained therein. The business of the partnership constituted in the firm name and style of ''Asmaco Plastic Industries'' commenced from 4-11-1974 and all the assets and liabilities of the assessee-firm were taken over and vested in the partnership constituted to carry on business in the firm name and style of ''Asmaco Plastic Industries'' on and from 4-11-1975. The firm of ''Asmaco Plastic Industries'' carried on business of manufacturing plastic cloth.

2. In the assessment year 1975-76 corresponding to previous year ended on 13-11-1974, the original assessment u/s 143(3) of the Act was completed on 30-12-1975 and development rebate of Rs. 50,385 was allowed to the assessee-firm on certain machineries valued at Rs. 3,35,908 purchased and put into use by the assessee-firm. Subsequently, when it came to the notice of the ITO that the machineries on which the development rebate was allowed, were transferred to the said firm of ''Asmaco Plastic Industries'' within a period of eight years of installation thereof and were not retained for the requisite number of years as contemplated in section 34(3)(b) of the Act, the ITO while exercising powers u/s 155(5) of the Act, withdrew the development rebate earlier granted after giving proper opportunity to the assessee-firm of being heard in the matter. The assessee-firm, being aggrieved by withdrawal of the development rebate by the ITO, preferred an appeal before the Commissioner (Appeals), which was rejected. The assessee-firm, thereafter, filed further appeal before the Tribunal, which also was rejected. It is in these circumstances that the reference has been made to this Court at the instance of the assessee-firm.

3. Mr. Bhujle, the learned counsel appearing for the assessee-firm, has submitted that the assessee-firm did not sell or otherwise transfer the machineries on which the development rebate of Rs. 50,305 was initially allowed by the income tax Officer in the assessment year 1975-76 within the meaning of section 34(3)(b) and that the firm of ''Asmaco Plastic Industries'' is not a new firm but an another unit of the assessee-firm with an additional partner and as such, the development rebate granted as aforesaid, has been wrongly withdrawn.

4. Section 34 sets out some of the conditions precedent to the grant of depreciation allowance and development rebate. Section 34(3) enacted at the relevant time, required fulfillment also of the following conditions, in addition to the other requirements, for allowance of development rebate:

(i) debiting of an amount equal to 75 per cent of the development rebate to be actually allowed to the profit and loss account of the relevant previous year and crediting the same to the reserve account; and

(ii) the ship, machinery or plant should not be sold or otherwise transferred for eight years from the end of the year of acquisition or installation, except to the Government, a local authority, a statutory Corporation, or a Government company or in connection with amalgamation or succession covered by sub-sections (3) and (4) of section 34.

The portion of section 34(3)(b), relevant for this reference, reads as under:

(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 u/s 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:

The words used in section 34(3)(b) have been ''sold or otherwise transferred by the assessee''. These words made it clear that the sale or transfer would entail withdrawal of rebate only where it was voluntarily made by the assessee. The word ''sold'' in section 34(3)(i) has no special definition but has been understood in its legal meaning as defined in section 54 of the Transfer of Property Act. The expression ''transfer'' has been defined in section 2(47) of the Act. As per section 2(47) ''transfer'' in relation to a capital asset, includes the sale, exchange or relinquishment of the asset or the extinguishment of any right therein or the compulsory acquisition thereof under any law and ''person'' as per clause (31) of section 2 amongst others includes a ''firm''.

5. The assessee-firm constituted under the said deed of partnership dated 29-10-1969 has, inter alia, been carrying on business of dealing in plastic cloth in the firm name and style of ''Asmaco'' since the year 1969 with two partners therein, viz., the said Husainbhai Nalwala and the said Aftabbhai Nalwala, having equal shares in profits and losses. On 4-11-1975, the said Husainbhai Nalwala, Aftabbhai Nalwala and H.A. Nalwala Family Trust entered into partnership with each other to carry on business of manufacturing plastic cloth in the firm name and style of ''Asmaco Plastic Industries'' on the terms and conditions mentioned in the deed of partnership dated 14-11-1975, clause 4 whereof reads as under:

4. All the assets of the old firm or whatsoever kind or nature including moneys, outstandings, choose-in-action, goodwill of the old firm, the licences, quota rights, sales-tax registration and all other rights of whatever kind and nature belonging to the old firm and existing and subsisting on 4th November, 1975 shall be as from the said date form part of the assets of and hereby vested in the firm hereby constituted. The firm hereunder constituted shall be liable for and pay and discharge all the debts, liabilities and obligations of the old firm.

As per clause 4 above, all assets including the machineries in respect of which the liabilities of the assessee-firm (described therein as ''old firm'') are taken over by and vested in the partnership firm carrying on business in firm name and style of ''Asmaco Plastic Industries'' with effect from 4-11-1975. Hence, the machineries in respect of which development rebate was granted to the assessee-firm during the previous year relevant to the assessment year under consideration became assets of the partnership firm of ''Asmaco Plastic Industries'' with effect from 4-11-1975. The said firm of ''Asmaco Plastic Industries'' is a separate firm from the assessee-firm with separate name, separate constitution and consists of three partners named above. Even the partnership firm carrying business in the firm name and style of ''Asmaco Plastic

Industries'' was separately registered under the provisions of Indian Partnership Act, 1932 than the assessee-firm. The assessee-firm extinguished all its rights, title and interest in the said machineries and the firm of ''Asmaco Plastic Industries'', a separate and independent entity, acquired the same with effect from 4-11-1975.The partnership firm carrying business in the name and style of ''Asmaco Plastic Industries'', being a separate and distinct ''person'' within the meaning of section 2(31) than the assessee-firm and the rights, title and interest of the assessee-firm in the said machineries having been extinguished on the same being taken over by and vested in the firm of ''Asmaco Plastic Industries'', there was transfer of the said machineries by the assessee-firm to the firm of ''Asmaco Plastic Industries'' within the period of eight years of acquisition or installation thereof by the assessee-firm, within the meaning of section 34(3)(b). Merely because two of the partners in the firm of ''Asmaco Plastic Industries'' have been same as in the assessee-firm, it was neither a case of mere admission of a new partner in the assessee-firm nor of the firm of ''Asmaco Plastic Industries'' being another unit of the assessee-firm.

6. In the facts of the case, we hold that the development rebate on the said machineries earlier allowed to the assessee-firm was justifiably with drawn. We find no infirmity in the order passed by the Tribunal in this regard.

7. We answer the question in the affirmative, that is, in favour of the revenue and against the assessee. There shall be no order as to costs.

