
(1988) 08 CAL CK 0036

In the Calcutta High Court

Case No : Income-tax Reference No. 95 of 1980

Commissioner of Income Tax

APPELLANT

Vs

Budge Budge Amalgamated Mills Ltd. (No. 2)

RESPONDENT

Date of Decision : 01-08-1988

Acts Referred:

Income Tax Act, 1961 — Section 154, 33

Citation : (1989) 175 ITR 378 : (1988) 41 TAXMAN 140

Hon'ble Judges : K.M. Yusuf, J;Ajit K. Sengupta, J

Bench : Division Bench

Advocate : S.K. Mitra and R.C. Prosad, for the Appellant;Debi Roy Chowdhury, for the Respondent

Judgement

Sengupta, J.—At the instance of the Commissioner, the following question of law has been referred to this court u/s 256(2) of the Income Tax Act, 1961 ("the Act"), for the assessment year 1961-62 :

"Whether, on the facts and in the circumstances of the case, the Tribunal misdirected itself in law in holding that the mistake sought to be rectified u/s 154 of the Income Tax Act, 1961, was not a mistake apparent from the record within the meaning of the said section ?"

2. The facts shortly stated hereinafter are as follows :

The assessee in its return of income had claimed development rebate of Rs. 4,55,623 even though it had created a reserve of Rs. 1,46,566 only. During the course of the assessment proceedings, the Income Tax Officer, by his letter dated January 17, 1964, directed the assessee to create the necessary reserve as could be seen from the following extracts from the said letter :

"The Income Tax Act, 1961, contemplates that the assessee has the obligation of computing his assessable profits and of making an adequate reserve of 75 per cent. of the development rebate actually allowable to him. The development rebate for the year according to your claim would be Rs. 4,55,623 but a reserve

of Rs. 1,46,566 only has been made by you obviously on the conception that the business profits for the year before considering development rebate would not exceed a sum of Rs. 1,71,000.

However, after considering the profit u/s 10(2)(vii), on the sale of assets of Orient Mills, the assessable profits would far exceed your computation that the entire development rebate for the year, if otherwise admissible, could be absorbed in this very year. As the development rebate created by you falls short of the statutory requirements, it would be permissible under the law to disallow development rebate to the extent of the deficiency on this ground alone. However, under instructions of the Central Board of Revenue, where the variation in the assessable profits exceed a certain amount, the Income Tax Officers have been directed to ask the assessee in writing to make within one month adequate additional reserve in the current year's account. Hence, on the basis of the instruction referred to above, you are hereby specifically directed to make within a month adequate additional reserves in the current year's account. If you fail to make the further reserve as advised above within one month of the service of this notice, the development rebate would be disallowed."

3. The assessee in reply to the said letter of the Income Tax Officer stated as under :

"We thank you for your letter Ref. No. C/I/C/2/C/H-62, dated 17th January, 1964, and have to advise you the following in respect of the development rebate claimed:

Development rebate claimable	Development rebate actually claimed
Development rebate claim c/f	Development rebate made 75 per cent.
Development rebate reserve required	

Rs. Rs. Rs. Rs. Rs.

1961-62 4,56,623 1,67,894 2,97,729 1,46,666 1,18,421

1962-63 4,97,955 Nil 7,96,684 2,68,300

2,97,729

1963-64 1,14,769

7,95,684 8,97,330

6,73,020

6,72,997

10,55,224

10,77,886

7,91,418

From the above, you will observe that, according to our return, the unabsorbed development rebate claim in respect of any assessment has been carried forward to the subsequent years and finally in 1963-64 assessment, the unabsorbed development rebate has been claimed. While in the above three years, total development rebate of Rs. 10,55,224 has been claimed, the total reserve made amounts to Rs. 10,77,886. The reserve, as required under the statute, has, therefore, been fully made.

From the above, it will, therefore, be clear that the further reserve you suggest to us to make within a month has already been made in 1963-64 assessment and, in the circumstances, unless we hear from you to the contrary, we think that further development rebate reserve will not be required to be made."

4. After this correspondence, the Income Tax Officer accepted the assessee's claim regarding the development rebate and allowed a sum of Rs. 4,30,111 as could be gathered from the assessment order. Thereafter, some time in early January 1967, the Income Tax Officer noticed that the assessee was in a position to create the entire amount of development rebate reserve as contemplated u/s 34(3)(a) of the Act in respect of the development rebate claimed by it and since the assessee had created a reserve of Rs. 1,46,566 only, the development rebate allowable to the assessee should be restricted to the extent of the reserve created by it. Since this would amount to enhancement of the assessment, the Income Tax Officer gave an opportunity to the assessee by his letter dated April 19, 1967, to state its case as to why the mistake crept in the assessment should not be rectified u/s 154 of the Act. The assessee in its reply dated April 26, 1976, objected to the proposed rectification of the Income Tax Officer. The Income Tax Officer, however, rejected the assessee's objection and rectified his earlier order u/s 154 on January 12, 1968, whereby he disallowed development rebate to the tune of Rs. 2,34,709.

5. In appeal, it was contended on behalf of the assessee that since the entire question about the allowability of the development rebate as claimed by the assessee was thoroughly gone into at the time of the original assessment, the Income Tax Officer was not justified in invoking the provisions of Section 154 with a view to disallowing a portion of the development rebate allowed originally. It was also submitted that the Income Tax Officer's action u/s 154 was based on mere change of opinion and that there was no mistake apparent from the record either of law or of facts as contemplated u/s 154. The Appellate Assistant Commissioner, in his order dated August 8, 1973, accepted the assessee's contention both as regards the creation of appropriate development reserve as well as the applicability of the provisions of Section 154.

6. Being aggrieved by the order of the Appellate Assistant Commissioner, the Revenue came up in appeal before the Tribunal,

7. The Tribunal, after considering the rival submissions of the parties, upheld the order of the Appellate Assistant Commissioner in its order dated April 18, 1974,

in the following manner :

"It is pertinent to note that in the original assessment, the Income Tax Officer had carefully gone into the assessee's claim for deduction in respect of development rebate. After having protracted correspondence with the assessee, the Income Tax Officer had allowed development rebate to the tune of Rs. 4,30,111. In this view of the matter, we are in full agreement with the submissions made on behalf of the assessee that the action of the Income Tax Officer in the present appeal was based on mere change of opinion and that there was no glaring or apparent mistake in the assessment order originally passed by the Income Tax Officer."

8. From the order of the Tribunal, it appears that as a matter of fact, the assessee created a reserve of Rs. 1,46,566 as against the requirement of Rs. 1,26,991. This finding of the Tribunal has not been challenged. The question is whether the development rebate was correctly allowed by the Income Tax Officer while making the original assessment after going through the facts and figures as submitted by the assessee. The Income Tax Officer wanted to withdraw the development rebate not on the ground that no development reserve was created but on the ground that in spite of having sufficient income, it was not done in the year in question but was created in the subsequent assessment year. The contention of the assessee is that in view of the circular of the Board, the deficiency can be made good in the subsequent year and it has been correctly done and that is the finding of the Tribunal. Reference has been made to the decision in the case of International Instruments P. Ltd. Vs. Commissioner of Income Tax, Karnataka, .

9. In that case, in 1965-66, the assessee had created a development rebate reserve which was in excess of the amount required by Rs. 1,71,534. The assessee contended that this amount would cover the claim made in the two assessment years 1967-68 and 1968-69. In fact, it could have, before preparing the profit and loss account and the balance-sheet, withdrawn the excess reserve and treated it as fresh reserve created during the relevant assessment years. But, as the balance-sheet and the profit and loss account had been sent to the Registrar of Companies, the assessee thought that it would not be proper to reconstruct the balance-sheet and the profit and loss account treating the said excess amount as fresh reserve. It, however, made a representation to the Central Board explaining the circumstances of the case and requesting the Board to issue necessary instructions to the assessing authorities to allow development rebate on the basis of the reserve already available. The Central Board of Direct Taxes issued instructions to the Department in favour of the assessee. The Appellate Assistant Commissioner issued instructions to the Income Tax Officer to grant the allowance. The Tribunal, however, held that the assessee was not entitled to the allowance because the instructions of the Central Board of Direct Taxes had been withdrawn. On a reference, it was held that the conclusion of the Tribunal was the result of a misconception. Circular No. 189 [1976] 102 ITR 90,

dated January 30, 1976, made it clear that only a part of Circular No. F. 10/49/65-ITA, dated October 14, 1965, which contained certain general instructions was withdrawn and that the other parts of that, circular which were not in conflict with the decision of the Supreme Court in The Indian Overseas Bank Ltd. Vs. The Commissioner of Income Tax, Madras, remained intact, The case of the assessee came under para 1 (c) of the Circular No. F. 10/ 49/65 which provided that where there was no deliberate contravention of the provisions, the Income Tax Officer could condone genuine deficiencies subject to the same being made good by the assessee through the creation of adequate additional reserve in the current year's books in which the assessment is framed. Further, the Central Board of Direct Taxes had issued specific instructions in exercise of its power u/s 119 of the Act. The assessee was, therefore, entitled to development rebate in the assessment for the assessment years 1967-68 and 1968-69,

10. Apart from the fact that there was a change of opinion while withdrawing the development rebate, oven on merits, the Revenue does not have any case. It is not disputed that the total income after giving effect to the appellate orders stood at Rs. 1,69,321. The necessary reserve for claiming the development rebate to the tune of Rs. 1,69,321 worked out to Rs. 1,26,991 but the assessee had actually created a reserve of Rs. 1,46,566.

11. We are, therefore, of the view that there was no mistake at all. We, therefore, answer this question in the negative and in favour of the assessee.

12. There will be no order as to costs.

Yusuf, J.

13. I agree.