
(2001) 02 RAJ CK 0128

In the Rajasthan High Court

Case No : IT Ref. No. 11 of 1992 7th February, 2001

Commissioner of Income Tax

APPELLANT

Vs

D.K. TRIVEDI and SONS

RESPONDENT

Date of Decision : 07-02-2001

Acts Referred:

Income Tax Act, 1961 — Section 143, 154, 155, 2, 32

Citation : (2001) 168 CTR 361 : (2001) 4 RLW 79 : (2001) 3 WLC 393

Hon'ble Judges : Sunil Kumar Garg, J;Rajesh Balia, J

Bench : Full Bench

Advocate : Sundeep Bhandawat, for the Revenue and Vineet Kothari, for the Assessee, for the Appellant;

Judgement

By the court :

The Tribunal, Jaipur, has referred the following question of law for opinion of this court which arises out of order of the Tribunal in ITA No. 860/Jp/1986 dated 17-11-1998.

"Whether, on the facts and in the circumstances of the case, the Tribunal was legally justified in setting aside the order passed by the Commissioner (Appeals) and in holding that investment allowance granted to the assessee cannot be withdrawn."

2. The facts of the case are that the respondent-assessee which is a registered firm had installed new machinery during the relevant previous year of the value of Rs. 2,07,017 on which investment allowance u/s 32A was claimed which came to Rs. 51,754. As required under law the assessee had created reserve for Rs. 39,000 for the purpose of making the above claim for investment allowance. This allowance was allowed while computing assessment originally made u/s 143(3) on 31-3-1980. After close of the previous year relating to the assessment year 1979-80, the firm was dissolved on 22-10-1979, and assets and liabilities of the firm were distributed amongst the four partners, namely, Jetha Lal D. Trivedi,

Jitendra D. Trivedi, Jaswant D. Trivedi and Ravindra D. Trivedi. The outgoing partners started their own business separately. On the distribution of the firm the amount in the credit of investment allowance reserve was also distributed between the two partners, namely, Jetha. Lal D. Trivedi and Jitendra D. Trivedi in the sum of Rs. 24,000 and 15,000, respectively. The distribution of investment allowance was done in 3rd year after the investment allowance was allowed for assessment year 1979-80. The assessing officer holding it to be in contravention of the provisions of section 32A(5)(c) of the Income Tax Act, invoked provisions of section 155(4A)(c) for the purpose of making necessary amendment in the assessment order of the assessment year 1979-80 by withdrawing the investment allowance.

Aggrieved with said order u/s 155(4A) read with section 154 of the Income Tax Act amending the assessment order for the year 1979-80 in the aforesaid manner, the assessee carried the matter before Commissioner (Appeals). He confirmed the view taken by the Income Tax Officer.

Being aggrieved, the assessee further appealed before the Tribunal. The Tribunal taking note of decision of Honble Supreme Court in the case of Malabar Fisheries Co. Vs. Commissioner of Income Tax, Kerala, and decision of Madras High Court in Commissioner of Income Tax, Tamil Nadu-I Vs. S. Balasubramanian, allowed the appeal and held that distribution of assets on dissolution of firm does not amount to utilisation of amount of reserve fund in contravention of provisions of section 32(A)(4).

In the aforesaid facts and circumstances, the Tribunal has raised above question of law and referred it to this court for its decision.

3. We have heard Mr. Sundeep Bhandawat learned counsel for the revenue and Mr. Vineet Kothari learned counsel for the assessee. Relevant provision of section 32A(5)(c) reads as under of which breach is alleged :

"if at any time before the expiry of ten years aforesaid, the assessee utilises the amount credited to the reserve account under sub-section (4) for distribution by way of dividends or profits or for remittance outside India as profits or for any other purpose which is not a purpose of business of the undertaking and the provisions of sub-section (4A) of section 155 shall apply accordingly."

Consequence of breach of condition for awarding benefit of claiming deduction of any sum as investment allowance has been provided u/s 155(4A) of the Act of 1961.

Sub-section 4A of section 155 to the extent relevant reads as under :

"(4A) Where an allowance by way of investment allowance has been made wholly or partly to an assessee in respect of a ship or an aircraft or any machinery or plant in any assessment year u/s 32A and subsequently

(a)

(b)

(c) at any time before the expiry of ten years referred to in clause (b) the assessee utilises the amount credited to the reserve account under sub-section (4) of section 32A

(i) for distribution by way of dividends or profits; or

(ii) for remittance outside India as profits or for the creation of any asset outside India; or

(iii) for any other purpose which is not a purpose of the business of the undertaking,

the investment allowance originally allowed shall be deemed to have been wrongly allowed and the assessing officer may, notwithstanding anything contained in this Act, recompute the total income of the assessee for the relevant previous year and make the necessary amendment., and the provisions of section 154 shall, so far as may be apply thereto"

4. The question therefore, falls for consideration is whether distribution of assets on dissolution of firm amongst partners whether amounts to utilisation of amount credited to the reserve account under sub-clause (4) of section 32A for distribution by way of dividends or profits or for any other purpose which is not a purpose of the business of the undertaking so as to invoke provision for deeming investment allowance having been wrongly allowed enabling the assessing officer to rectify the assessment order in terms thereof.

5. We are of the opinion that the matter stands concluded by the decision of Honble Supreme Court in the case of Malabar Fisheries Co. v. CIT (supra).

6. The controversy before the Apex Court had arisen in the wake of identical provision relating to development rebate allowed u/s 33 of the Act of 1961 where under development rebate allowed as deduction in the assessment order in respect of acquisition of new ship, machinery or plant installed, after 31-12-1957, has been subjected to very same conditions u/s 155(5). For comparative reading of the provisions, the relevant part of sub-section (5) of section 155 is reproduced hereunder :

"(5) Where an allowance by way of development rebate has been made wholly or partly to an assessee in respect of ship, machinery or plant installed after 31-12-1957, in any assessment year u/s 33 or under the corresponding provisions of the Indian Income Tax Act, 1922 (11 of 1922) and subsequently

(i)

(ii) at any time before the expiry of the eight years referred to in sub-section (3) of section 34, the assessee utilises the amount credited to the reserve account under clause (a) of that sub-section

(a) for distribution by way of dividends or profits; or

(b) for remittance outside India as profits or for the creation of any asset outside India; or

(c) for any other purpose which is not a purpose of the business of the undertaking,

the development rebate originally allowed shall be deemed to have been wrongly allowed and the assessing officer may, notwithstanding anything contained in this Act, recompute the total income of the assessee for the relevant previous year and make the necessary amendment; and the provisions of section 154 shall, so far as may be apply thereto the period of four years specified in sub-section (7) of that section being reckoned from the end of the previous year in which the sale or transfer took place or the money was so utilised."

The Honble Supreme Court considering the question in light of distribution of assets on dissolution of firm, said.

"A partnership firm under the Indian Partnership Act, 1932, is not a distinct legal entity apart from the partners constituting it and equally in law the firm as such has no separate rights of its own in the partnership assets and when one talks of the firms property or the firms assets all that is meant is property or assets in which all partners have a joint or common interest. It cannot therefore, be said that upon dissolution, the firms right in the partnership assets are extinguished. It is the partners who own jointly or in common the assets of partnership and, therefore, the consequence of the distribution, division or allotment of assets to the partners which flows upon dissolution after discharge of liabilities is nothing but a mutual adjustment or rights between partners and there is no question of any extinguishment of the firms rights in the partnership assets amounting to a transfer of assets within the meaning of section 2(47) of the Income Tax Act, 1961. There is no transfer of assets invoked even in the sense of any extinguishment of the firms rights in the partnership assets when distribution takes place upon dissolution.

In order to attract section 34(3)(b) it is necessary that the sale or transfer of assets must be by the assessee to a person. Dissolution of a firm must, in point of time, be anterior to the actual distribution, division or allotment of the assets that takes place after making accounts and discharging the debts and liabilities due by the firm. Upon dissolution the firm ceases to exist; then follows the making up of accounts, then the discharge of debts and liabilities and thereupon distribution, division or allotment of assets to the erstwhile partners is not done by the dissolved firm. In this sense, there is no transfer of assets by the assessee (dissolved firm) to any person. It is not correct to say that the distribution of assets takes place eo instanti with the dissolution of the firm or that it is effected by the dissolved firm."

In the conclusion, the Supreme Court held that in case of distribution of assets on dissolution of a partnership firm, section 34(3)(b) was not applicable and consequently the development rebate allowed to the firm could not be withdrawn

on such distribution of assets u/s 155(5).

7. Same principle applies while considering utilisation of the amount credited to reserve account in the case of investment allowance.

In view of aforesaid, the answer to the question referred to is affirmative, i.e., in favour of assessee and against the revenue.