

(1992) 11 KAR CK 0055
In the Karnataka High Court
Case No : Income Tax R.C. No. 104 of 1989

Commissioner of Income Tax

APPELLANT

Vs

Hotel Ayodya

RESPONDENT

Date of Decision : 04-11-1992

Acts Referred:

Income Tax Act, 1961 — Section 32 A, 32 A (1), 80 J, 80 J (1)

Citation : (1993) 109 CTR 106 : (1993) 201 ITR 1002 : (1993) 37 KarLJ 140 : (1993) 67 TAXMAN 144

Hon'ble Judges : R. Ramakrishna, J;K. Shivashankar Bhat, J

Bench : Division Bench

Advocate : H. Raghavendra Rao, for the Appellant; K.S. Ramabhadran, for the Respondent

Judgement

K. Shivashankar Bhat, J.—In respect of the assessment year 1981 - 82, the following question has been referred for our consideration u/s 256(1) of the Income Tax Act, 1961 :

"Whether on the facts and in the circumstances of the case, the assessee which is doing business of running a hotel is entitled to investment allowance u/s 32A in respect of the new machinery installed in the previous year relevant to the assessment year 1981-8 ?"

2. The assessee is a hotelier. In respect of certain new machinery installed, the assessee claimed investment allowance u/s 32A of the Act. The claim of the assessee was not accepted by the Income Tax Officer and the said view was affirmed by the Appellate Assistant Commissioner. However, the Appellate Tribunal followed its view expressed in another case and held that hotel is an industry entitled to investment allowance.

3. Mr. Raghavendra Rao, learned counsel for the Revenue, strongly relied on the decision of the Kerala High Court to contend that the hotel is a trading concern and not an industrial undertaking. The said decision of the Kerala High Court in

Commissioner of Income Tax Vs. Casino (Pvt.) Ltd., The High Court started the discussion by posing the question as to whether it could be said that a hotelier produces the goods for serving its customers in the restaurant by manufacturing or processing them. On this aspect, the Bench held after some discussion, at page 298, thus;

"The result of our discussion can be summed up in these terms; Manufacture is a process which results in an alteration or change in the goods which are subjected to such manufacture. A commercially new different article is produced. May be that it is produced by manual labour or mechanical force or even by nature's own process such as drying by heat of the sun as in a salt pan (Ardeshir H. Bhiwandiwalla v. State of Bombay [1961] 20 FJR 113 (SC)) or fermentation of toddy (Thomas v. District Judge Alleppey [1965] KarLJ 487). The essential question is whether a commodity which, in a commercial sense, is different from the raw materials, has resulted.

Notwithstanding what we have said above every case where the court is called upon to consider the meaning of the term "manufacture" has to be considered with reference to the context of the enactment. The mere fact that the definition is satisfied does not necessarily mean that there is manufacture."

4. Thereafter, the Bench opined that it was unnecessary to go into the scope of the term "processing" in the circumstances of the case as the contention of the assessee was that there has been a material change or alteration in the goods resulting in the production of a different commodity. It was observed thereafter at page 299 :

"The assessee's contention that the foodstuffs produced in its hotel using raw materials such as pulses, meat, wheat and the like, are commercially different from such raw materials is a matter on which there cannot be any scope for controversy. It is for this reason that the assessee urges that it is an "industrial company" as, according to it, the accepted test stands satisfied. But, we have to remember that the term must be understood in the context of the enactment. We will have to see whether persons concerned, the customers of the hotel and the employees, would employ the term in the sense in which it is sort to be construed. The particular provision of the Finance Act with which we are concerned here prescribes specific rates of tax and the assessee seeks to be included within the definition of the term "industrial company", so as to get the benefit of the lesser rate of taxation. This benefit is given only to industrial companies which satisfy certain requirements. The four categories of companies which are included in the scope of the term are those mainly engaged in the business of generation or distribution of electricity or any other form of power or mainly engaged in the construction of ships or similarly engaged in mining or in the manufacture or processing of the goods. The context is apparent from this definition. The question ultimately would be whether in common parlance the activity of the assessee could be said to be one of manufacture or processing of the goods, whatever may be the technical meaning of the term. The assessee is

dealing every day with his customers. Could it be said that the customers visiting the assessee's hotel would ask for the items in the menu list to be manufactured and supplied to them. We do not think that it would be appropriate to refer, in the ordinary sense in which we understand in the English language, to the production of food materials in the assessee's hotel as manufacture. Any customer visiting a hotel would ask to be supplied with the food and beverages that is for sale in the hotel and if the waiter were to tell the customer that his order is being "manufactured", it is likely that the customer would feel something strange about it. It would not pass off, normally, unnoticed. Equally so the customer may not also appreciate if he is told that the wheat or the meat which are used as raw materials are being "processed" as we understand the term ordinarily "Processing" in such context, would mean something less than the complete loss of identity of the goods which is the case when the food materials are prepared in the hotel. Hence, if construction of the term in the popular sense is the test to be applied, we do not think that it is possible to say that the assessee manufactures or processes goods in its hotel."

5. The Kerala High Court held that a hotel is a trading concern as it is mainly intended for trading and not for production or manufacture

6. This decision is based on the definition of industrial company in section 2 (6) (d) of the Finance Act, 1968.

7. The Madras High Court also took a similar view in Commissioner of Income Tax (Central) Madras Vs. Buhari Sons Pvt. Ltd., The decision is u/s 2 (7) (d) of the Finance Act, 1966. The Bench held that the definition is always subject to the context and the expression "manufacture" does not denote a trading activity and an activity carried on in a hotel can only be taken to be a trading activity and not a manufacturing activity.

8. Koshy's Private Limited Vs. Commissioner of Income Tax, Karnataka, is a decision of this court which was concerned with section 2 (8) (c) of the Finance Act, 1975. The phrase "mainly engaged in" is found in all the above referred Finance Acts. The Bench considered the scope of the terms "processing" and "manufacturing" and thereafter held as follows (at page 58) :

"Having thus seen the broad distinction between "manufacture" and "processing", we may now turn to the facts of the case. In the restaurant the menu list contains different varieties of food and beverages. Some preparations offered to customers are the mixtures of a number of articles of food. It is quite common that some ready-made drinks and food are also offered which never undergo any processing or handling by the workmen. Some preparations, however, may undergo some kind of processing.

But there is no evidence of the income separately attributable to such preparations. In the absence of such evidence, the assessee's claim that the entire income from the restaurant section could be attributable to activities falling within the meaning of "manufacture" or "processing" of goods cannot,

therefore, be entertained."

9. The Bench also noticed section 80J of the Act and pointed out that a hotel is included along with industrial undertaking for the purpose of relief under the said section. Obviously, the Bench was indicating that the Act itself made a distinction between an industrial undertaking and the business of a hotel.

10. In *Delhi Cold Storage Pvt. Ltd. Vs. Commissioner of Income Tax, New Delhi*, the Supreme Court held that no processing is involved in a cold storage plant. The processing is understood as an action which bring forth some change or alteration of the goods or material subject to the act of processing. Even as a result of long duration of storage vegetables, fruits and other articles which require preservation do not undergo any processing.

11. u/s 32A(1), investment allowances is granted with reference to the subject-matter on which an assessee invests, such as ship or an aircraft or machinery or plant specified in sub-section (2). The assessee should own the subject (here the machinery) and the said machinery is to be wholly used for the purposes of the business carried on by him. As per sub-section (2), the machinery referred to in sub-section (1) shall be the one enumerated in sub-section (2). Clause (b) of this sub-section, inter alia, states that the machinery installed in an industrial undertaking for the purposes of business of construction, manufacture or production of any article or thing, not being an article or thing specified in the list in the Eleventh Schedule is machinery that would be covered by sub-section (1). Section 32A nowhere defines the term "industrial undertaking" in the manner the term "industrial company" was defined in the several Finance Acts, considered by the Kerala and Madras High Courts. In those Finance Acts, the dominant engagement of the company was the test to bring in the assessee under the definition of "industrial company". The said restriction is not found in section 32A. The assessee may carry on many kinds of business including industrial activities. The industrial activity of the assessee may be of a minor character when compared to the main activity of the assessee. So long as the machinery is owned by the assessee and the said machinery is installed in any industrial undertaking, subject to the condition that the machinery is used for the purposes of the business of the assessee, the assessee is entitled to the benefit of section 32A. Sub-section (2) of section 32A enumerates the machinery, etc., in respect of which an assessee could claim the benefit of section 32A(1), subject to other conditions. The primary requirement to be satisfied u/s 32A(2) is that the installation of the machinery is to be in an industrial undertaking and, therefore, the real question is to find out whether the hotel is an industrial undertaking. The dominant activities of the undertaking have to be considered for the purposes. The Income Tax Officer as well as the Appellate Assistant Commissioner negated the claim of the assessee by relying on the aforesaid two decisions, one of the Kerala High Court and another of the Madras High Court, though the facts therein disclose that the relevant term was defined under the Finance Acts considered therein. However, the underlying reasoning of those decision has a

direct bearing on the present issue. The Appellate Tribunal has assumed that its earlier decision in Hotel Navarathna's case would govern the fact situation.

12. In Commissioner of Income Tax Vs. Mahalinga Setty and Co., this court held that the term "article" or "thing" is of wide import and a dam constructed by a constructing company could be covered by the said terms. An earlier decision in Shankar Construction Co. Vs. Commissioner of Income Tax, was followed.

13. In the said Shankar Construction Co. Vs. Commissioner of Income Tax, the Bench had given a broad meaning to the phrase "industrial undertaking". It was held therein, in connection with section 32A of the Act, that investment allowance can be claimed by an "industrial undertaking", the expression "industrial undertaking" has not been defined in the Income Tax Act and that, "industry" is a term of wide import. Where there is (i) systematic activity; (ii) organised by co-operation between employer and employee; (iii) for the production and/or distribution of goods and services calculated to satisfy human wants and wishes, prima facie there is an industry. This court applied the decision of the Supreme Court, which was actively considering the definition of the term "industry" found in the Industrial Disputes Act.

14. However, the Calcutta High court has specifically held that the business of hotel keeping is not an industrial undertaking, in Commissioner of Income Tax Vs. S.P. Jaiswal Estates (P.) Ltd., and the Bench observed at page 185 thus :

"It is no doubt true that a hotel also produces eatables from raw materials like vegetables, meat, fish, spices and so on, for catering to the needs of the customers. But such manufacturing or production of goods that may be involved therein is only incidental or ancillary to the business of hotel keeping.

Apart from meals, a hotel provides entertainment and various personal services, with halls for drinking, dancing, exhibitions and group meetings with shops having both inside and street side entrances and offering for sale items such clothes, gifts, candy, theatre tickets, travel tickets. These are also ancillary activities; but do not fall in the activity of manufacture or production. The basic ingredient of hotel keeping is providing lodging or maintaining a building consisting of many rooms for overnight accommodation which has nothing to do with any manufacturing or producing article or thing.

The formidable difficulty that the assessee's claim for the investment allowance has to overcome is the fact that preparation and supply of goods by a restaurant and the same act by a hotel keeper does not stand on the same footing. Particularly when pitted against the expression used by the Legislature in sub-clause (iii) of clause (b) of sub-section (2) of section 32A, the assessee who claims investment allowances has to be an assessee carrying on the business of manufacturing or producing any article or thing. Therefore, the business itself has to be that of manufacture or production. This is apparent from the contradiction maintained by other sections of the Act where a manufacturing or producing undertaking stands apart from the business of a hotel."

15. In Northern India Caterers (India) Ltd. Vs. Lt. Governor of Delhi, the Supreme Court had an occasion to consider the nature of the hotel business. After tracing the origin and historic development of hotel business, the Supreme Court pointed out that sale of eatables is incidental to the services rendered in a hotel and, therefore, it was not a case of sale of goods. Relying on this, it was contended that the preparation of food articles in a hotel is also incidental to rendering of the service at the hotel, whether it is a restaurant or a lodging house. Therefore, it cannot be said that a hotel is an industrial undertaking.

16. The assessee's case is that it has installed machinery to manufacture or produce food articles. It has installed it in the hotel or probably in a space which is convenient for the purpose of producing or manufacturing the food articles. Section 32A(2)(b)(iii) requires that the machinery should be installed in any industrial undertaking; therefore, the installation should be at a place which can be described as an industrial undertaking. It is at this stage that the ratio of the decisions of the Kerala High Court and Madras High Court read in the light of the decision of the Supreme court in Northern India Caterers (India) Ltd. Vs. Lt. Governor of Delhi, would govern the interpretation of the relevant provision.

17. Section 80J(1) refers to an "industrial undertaking" and "the business of a hotel" separately, which is an indication that a hotel is not an "industrial undertaking" for the purposes of the Act, unless specifically stated to be so. Installation of the machinery, in the instant case, is in a hotel, which is a trading concern and not in an industrial undertaking. Since the hotel business cannot be called an industrial undertaking, we are of the view that the Appellate Tribunal was not justified in granting the relief u/s 32A to the assessee.

18. Consequently, we answer the question in the negative and in favour of the Revenue.

19. Reference answered accordingly.