

(1996) 01 KL CK 0009

In the High Court Of Kerala

Case No : Income-tax Reference No's. 553 and 554 of 1985

Commissioner of Income Tax

APPELLANT

Vs

Oceanic Products Exporting Co.

RESPONDENT

Date of Decision : 10-01-1996

Acts Referred:

Finance Act, 1966 — Section 2(5)
Income Tax Act, 1961 — Section 80HH, 80J

Citation : (1996) 54 ECC 80 : (1996) 2 ILR (Ker) 571 : (1996) 219 ITR 293

Hon'ble Judges : K.S. Radhakrishnan, J; K.K. Usha, J

Bench : Division Bench

Advocate : P.K. Ravindranatha Menon and N.R.K. Nair, for the Appellant; G. Sivarajan, for the Respondent

Judgement

K.K. Usha, J.—At the instance of the Revenue, the Income Tax Appellate Tribunal has referred the following question of law to this court for opinion u/s 256(1) of the Income Tax Act, 1961 :

" Whether, on the facts and in the circumstances of the case, the Tribunal was justified in granting relief u/s 2(5)(a)(ii) of the Finance Act, 1966, to the assessee ?"

2. Income Tax Reference No. 553 of 1985 relates to the assessment year 1965-66 and Income Tax Reference No. 554 of 1985 relates to the assessment year 1966-67, in respect of the same assessee. For the years 1965-66 and 1966-67, the Income Tax Officer while reopening the assessment, denied the rebate originally granted to the assessee u/s 2(5)(a)(ii) on the ground that the assessee was not doing any manufacturing activity. On an appeal by the assessee, the Appellate Assistant Commissioner found that the assessee was entitled to the rebate which view was affirmed by the Tribunal on the appeal filed by the Revenue.

3. The assessee is doing the business of processing fish and exporting the same.

The fish is peeled, deveined and then cleaned. Thereafter, it is preserved using chlorine water and certain approved chemicals. It is pressed into a slab in the freezer and packed in suitable containers. The assessing authority took the view that such process will not come within the term "manufacture" so as to enable the assessee to claim rebate u/s 2(5)(a)(ii) of the Finance Act, 1966. The appellate authority took the view that the process would amount to manufacture.

4. For the assessment year 1966-67, an appeal in respect of which was heard by the Tribunal first, the Tribunal took the view that prima facie, the activity of the assessee may appear to be a case of processing, but the context in which the word "manufacture" is used in the Finance Act has to be considered. If an end-product is processed food, then, according to the Finance Act, 1966, the process by which it was made is a manufacturing process. The article made by the assessee is an item in the Fifth Schedule. In such cases, the word "manufacture" has to be interpreted in the context in which it is used. According to the Tribunal, the word "manufacture" is used in Section 2(5)(a)(ii) to take in a case of processing also.

5. It is contended before us on behalf of the Revenue that the view taken by the Tribunal is directly against the statutory provision as also settled legal position. Section 2(5)(a)(ii) of the Finance Act, 1966, reads as follows :

" where he is engaged in the manufacture of any articles in an industry specified in the First Schedule to the Industries (Development and Regulation) Act, 1951 (65 of 1951), and has, during the previous year, exported such articles out of India, he shall be entitled, in addition to the deduction of Income Tax referred to in Sub-clause (i), to a further deduction, from the amount of Income Tax with which he is chargeable for the assessment year, of an amount equal to the Income Tax calculated at the average rate of Income Tax on an amount equal to two per cent, of the sale proceeds receivable by him in respect of such export."

6. The word used in the section is "manufacture". So, according to the Revenue, unless the process carried on by the assessee would come within the meaning of "manufacture", he is not entitled to the rebate. It was further contended that since the fish which is being processed and then exported by the assessee as such cannot be consumed, it cannot be treated as processed food coming under item 27 of the First Schedule to the Industries (Development and Regulation) Act, 1951. It can be only food stuff, is the argument.

7. In support of the contention that the process carried on by the assessee will not come within the term "manufacture", learned counsel appearing on behalf of the Revenue relied on the decisions of the Supreme Court in *Sterling Foods v. State of Karnataka* [1986] 63 STC 239 ; *Commissioner of Income Tax, Orissa and Others Vs. N.C. Budharaja and Company and Others*, and *Delhi Cold Storage Pvt. Ltd. Vs. Commissioner of Income Tax, New Delhi*, . Reliance was also placed on the decision of the Bombay High Court in *Commissioner of Income Tax Vs. Sterling Foods (Goa)*, .

8. The assessee would contend that even though the word used is "manufacture" in Section 2(5)(a)(ii) of the Finance Act, 1966, since the said section refers to industries under the First Schedule to the Industries (Development and Regulation) Act, 1951, which, in turn, refers to both "manufacture and production" for the purpose of the Finance Act, it has to be taken that the word "manufacture" is used in juxtaposition with the word "production". In support of the above contention, reliance was placed on the decisions of this court in Commissioner of Income Tax Vs. Marwell Sea Foods, ; Commissioner of Income Tax Vs. Relish Foods, ; Commissioner of Income Tax Vs. Poyilakada Fisheries Pvt. Ltd., and Commissioner of Income Tax Vs. Poyilakkada Fisheries Pvt. Ltd., . Reliance was also placed on the decision in Commissioner of Income Tax, Orissa and Others Vs. N.C. Budharaja and Company and Others, . It is submitted that the activity carried on by the assessee would come within item 27 in Schedule I to the Industries (Development and Regulation) Act, 1951.

9. We have no hesitation to reject the contention taken by the Revenue that the processed fish is not processed food, but only food stuff. Merely because the processed fish as such cannot be consumed, it cannot be contended that it is not food. A mere look at the item 27 of Schedule I to the Industries (Development and Regulation) Act, 1951, would make it clear. Item 27 reads as follows :

"27. Food processing industries :

(1) Canned fruits and fruit products.

(2) Milk foods.

(3) Malted foods.

(4) Flour.

(5) Other processed foods."

10. Flour also cannot be consumed as such. But, even then, it is included under the food processing industries.

11. Therefore, we are of the view that the processed fish exported by the assessee would come under the item "other processed foods".

12. But, even if the assessee is engaged in processing food, that will not make him eligible for the rebate u/s 2(5)(a)(ii) of the Finance Act, 1966, unless he is engaged in the manufacture of any article. In Deputy CST (Law), Board of Revenue (Taxes) v. Pio Food Packers [1980] 46 STC 63, the Supreme Court had considered the meaning of the term "manufacture" and held as follows (page 65) :

" Commonly, manufacture is the end result of one or more processes through which the original commodity is made to pass. The nature and extent of processing may vary from one case to another, and indeed there may be several stages of processing and perhaps a different kind of processing at each stage.

With each process suffered, the original commodity experiences a change. But it is only when the change, or a series of changes, take the commodity to the point where commercially it can no longer be regarded as the original commodity but instead is recognised as a new and distinct article that a manufacture can be said to take place."

13. This view has been reiterated by the Supreme Court in the decision reported in CIT v. N. C. Budharaja and Co. [1995] 204 ITR 412. At page 423, it was observed as follows :

" The words "manufacture" and "production" have received extensive judicial attention both under this Act as well as the Central Excises Act and the various sales tax laws. The word "production" has a wider connotation than the word "manufacture". While every manufacture can be characterised as production, every production need not amount to manufacture."

14. In Sterling Foods, A Partnership Firm represented by its Partner Shri Ramesh Dalpatram Vs. State of Karnataka and Another, , while considering the applicability of Section 5(3) of the Central Sales Tax Act, 1956, the Supreme Court took the view that when raw shrimps, prawn and lobsters are subjected to the process of cutting of heads and tails, peeling, deveining, cleaning and freezing, they do not cease to be shrimps, prawns and lobsters and become another distinct commodity. They are in common parlance known as shrimps, prawns and lobsters. They are not a new and distinct commodity, but they retain the same character and identity as the original shrimps, prawns and lobsters.

15. In the decision in Delhi Cold Storage Pvt. Ltd. Vs. Commissioner of Income Tax, New Delhi, , the question that came up for consideration before the Supreme Court was whether running of a cold storage would be an industrial company for the purpose of Section 2(7)(c) of the Finance Act, 1973, and Schedule I thereto thus being eligible for concessional rate of tax thereunder. Section 2(7)(c) defines an industrial company meaning a company which is mainly engaged in the business of generation or distribution of electricity or any other form of power or in the construction of ships or in the manufacture or processing of goods or in mining. In this connection, the meaning of the word "processing" was considered and it was held as follows (page 660) :

" In common parlance, "processing" is understood as an action which brings forth some change or alteration of the goods or material which is subjected to the act of processing.... processing involves bringing into existence a different substance from what the material was at the commencement of the process. "

16. The court ultimately held (page 660) :

" In a cold storage, vegetables, fruits and several other articles which require preservation by refrigeration are stored. While, as a result of long storage, scientific examination might indicate loss of moisture content, that is not sufficient for holding that the stored articles have undergone a process within the

meaning of Section 2(7)(c), Finance Act, 1973."

17. In Commissioner of Income Tax Vs. Sterling Foods (Goa), , the Bombay High Court, while considering the provision contained u/s 80HH of the Income Tax Act, 1961, took the view that by the subjecting of prawns to processing for the purpose of export, they do not lose their original character. No new commodity or article emerges as a result of such processing. The processed prawns retain their identity as prawns. No manufacture, therefore, can be said to take place as a result of such processing. That being the position, the provisions of Section 80HH of the Act would have no application to an undertaking which was engaged in the processing of prawns for making them fit for the market. The learned judges of the Bombay High Court dissented from the view taken by this court in Commissioner of Income Tax Vs. Marwell Sea Foods, which was relied on by learned counsel appearing on behalf of the assessee before us.

18. In Commissioner of Income Tax Vs. Marwell Sea Foods, , a Division Bench of this court considered the scope of Section 80HH of the Income Tax Act, 1961. The relevant portion of the section reads as follows :

" Section 80HH.(2) This section applies to any industrial undertaking which fulfils all the following conditions, namely :--

(i) it has begun or begins to manufacture or produce articles after the 31st day of December, 1970, in any backward area ;

(iv) it employs ten or more workers in a manufacturing process carried on with the aid of power, or employs twenty or more workers in a manufacturing process carried on without the aid of power. . . ."

19. This court took the view that since in Clause (i), the words "manufacture" and "produce" are used, in Clause (iv), the term "manufacturing process" should take in "production process" also. Thus, when prawns are prepared for the market, even though the process will not come strictly within manufacturing process, it should be treated as production process and given the benefit of Section 80HH. This decision was subsequently followed in Commissioner of Income Tax Vs. Relish Foods, . Thereafter, while considering the entitlement to special deduction u/s 80J of the Income Tax Act, 1961, the same principle was followed by this court in Commissioner of Income Tax Vs. Poyilakada Fisheries Pvt. Ltd., and Commissioner of Income Tax Vs. Poyilakkada Fisheries Pvt. Ltd., .

20. In the First Schedule under the Industries (Development and Regulation) Act, 1951, the title given is as follows :

" Any industry engaged in the manufacture or production of any of the articles mentioned under each of the following headings or subheadings, namely :"

21. The assessee would contend that both the words "manufacture" and "production" are used in the First Schedule. Therefore, when we consider Section 2(5)(a)(ii) of the Finance Act, 1966, the word "manufacture" is to be taken as

used in juxtaposition with production. Learned counsel for the assessee who relied on the above decisions, further pointed out that in the decision reported in Commissioner of Income Tax, Orissa and Others Vs. N.C. Budharaja and Company and Others, , the Supreme Court has observed at page 424 that it is equally well to keep in mind the context since a word takes its colour from the context. Therefore, according to the assessee, the word "manufacture" used in Section 2(5)(a)(ii) would take in other process also, it cannot be restricted to a process where a new produce different from the ingredients comes into being thereby making the process a manufacturing process.

22. We find it difficult to accept the above contention. As mentioned earlier, the only word used in Section 2(5)(a)(ii) is "manufacture". Schedule I of the Act may take in both "manufacture" and "production". But, since the word "production" is not used in Section 2(5)(a)(ii), it has to be taken that the Legislature wanted to apply the provisions of the Finance Act only to cases where there is a manufacture. Therefore, the decisions under Sections 80HH and 80J relied on by the assessee have no application in the present case. Where the Legislature had not intended to give the benefit to an assessee who is carrying on a process which is not manufacture, it is not for this court to hold that the word "manufacture" was used in juxtaposition with the word process or production. We are, therefore, of the view that the assessee cannot claim rebate u/s 2(5)(a)(ii) of the Finance Act, 1966, as it is not engaged in manufacturing activity.

23. We answer the question referred in both the cases in the negative, in favour of the Revenue and against the assessee.

24. A copy of this judgment under the seal of this court and the signature of the Registrar will be forwarded to the Income Tax Appellate Tribunal, Cochin Bench.