
(1989) 06 CAL CK 0033

In the Calcutta High Court

Case No : Income-tax Reference No. 141 of 1982

Commissioner of Income Tax

APPELLANT

Vs

Orissa Textile Mills Ltd.

RESPONDENT

Date of Decision : 26-06-1989

Acts Referred:

Income Tax Act, 1961 — Section 33, 33(1), 34, 34(3)

Citation : (1991) 192 ITR 75

Hon'ble Judges : Bhagabati Prasad Banerjee, J;Ajit K. Sengupta, J

Bench : Division Bench

Judgement

Ajit K. Sengupta, J.—In this reference u/s 256(2) of the Income Tax Act, 1961, for the assessment year 1972-73, the following two questions of law have been referred to this court:

"(1) Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in holding that the assessee was entitled to carry forward the balance of Rs. 2,96,308 by way of development rebate in the absence of creation of any appropriate reserve in the accounts of the year in question ?

(2) Whether, on the facts and in the circumstances of the case, the Tribunal was justified in law in holding that the assessee is entitled to the full amount of development rebate totalling to Rs. 8,29,641 ?"

2. The facts shortly stated are that the assessee, who is engaged in the manufacture of textile goods, claimed before the Income Tax Officer development rebate of Rs. 8,29,641 but credited development rebate reserve of Rs. 4 lakhs only. This reserve credited fell short of the statutory requirement of 75% of the claim for development rebate. The Income Tax Officer, therefore, allowed development rebate to the extent of Rs. 5,33,333 corresponding to the reserve created of Rs. 4 lakhs. This was partly set off against the available profit of Rs. 1,10,047 computed by the Income Tax Officer and the unabsorbed development rebate of Rs. 4,23,286 (Rs. 5,33,333 minus Rs. 1,10,047) was

carried forward by the Income Tax Officer.

3. The assessee went up in appeal before the Appellate Assistant Commissioner against the order of the Income Tax Officer. Following the decision of the Calcutta High Court in *West Laikdih Coal Co. Ltd. Vs. Commissioner of Income Tax*, the Appellate Assistant Commissioner held that the entire sum of Rs. 8,29,651 was allowable as development rebate and directed the Income Tax Officer to carry forward the balance of Rs. 2,96,308 being the difference between the development rebate claimed by the assessee and that allowed by the Income Tax Officer.

4. The Department filed an appeal against the order of the Appellate Assistant Commissioner before the Tribunal. It was contended on behalf of the Department that, under Sections 33 and 34, the allowability of claim for development rebate depended, amongst other conditions, upon the creation of a development rebate reserve equal to 75% of the development rebate claimed. It was also argued that the assessee had commercial profits and, therefore, an adequate amount of reserve should have been created in accordance with law. He relied on the decision of the Gujarat High Court in the case of *Addl. CIT v. Shri Subhlaxmi Mills Ltd.* [1975] 100 ITR 188. The Tribunal rejected all the contentions of the Department and held that the actual amount of development rebate allowed was Rs. 1,10,047 and, therefore, the assessee was obliged to create an appropriate reserve only with reference to this amount but, in fact, created a reserve to the extent of Rs. 4 lakhs. For this reason, it held that it was not necessary for the assessee to create an appropriate amount of reserve with reference to the claim of Rs. 8,29,641. The Tribunal, therefore, confirmed the decision of the Appellate Assistant Commissioner. On these facts, the questions set out above have been referred to this court. Our attention has been drawn to a recent decision of the Supreme Court in *Shri Shubhlaxmi Mills Limited Vs. Additional Commissioner of Income Tax, Gujarat*. There, the Supreme Court held as follows (pp. 195, 196, 197) :

"The Finance Act, 1966, added an Explanation to this clause. The Explanation declared that the deduction referred to in Section 33 could not be denied by reason only that the amount debited to the profit and loss account of the relevant previous year and credited to the aforesaid reserve account exceeded the amount of the profit of such previous year (as arrived at without making the deposit aforesaid) in accordance with the profit and loss account. The Explanation was inserted with retrospective effect from the commencement of the Act. Before the Explanation was enacted, difference of opinion had existed between the High Courts on the question whether the statute required the creation of the reserve in the previous year in which the new machinery or plant was installed, when the amount of the profit of that previous year was either nil or insufficient for the purposes of enabling the creation of such reserve. It is not necessary to refer to these cases, for it seems clear to us that the Explanation, which applies to the assessment year under consideration before us, removes the

doubt altogether. What is contemplated is the creation of a reserve fund in the relevant previous year irrespective of the result of the profit and loss account disclosed by the books of the assessee. Mere book entries will suffice for creating such a reserve fund, The debit entries and the entries relating to the reserve fund have to be made before the profit and loss account is finally drawn up. That is a condition for securing the benefit of development rebate and if that condition is not satisfied, we fail to see how the deduction on account of development rebate can be claimed at all.

Learned counsel for the assessee relies on *West Laikdihi Coal Co. Ltd. Vs. Commissioner of Income Tax*, and *Commissioner of Income Tax, Central Vs. Modi Spinning and Weaving Mills Co. Ltd.*, . Those were cases decided under the provisions of the Indian Income Tax Act, 1922, and there was no Explanation such as the one we have before us."

"Having considered the matter at some length in the present case, it seems to us clear that in order to claim the deduction on account of development rebate under Sub-section (1) of Section 33, it is obligatory that the debit entries in the profit and loss account and the credit entry in a reserve account should be made in the relevant previous year in which the machinery or plant is installed or first put to use. The development rebate contemplated by Sub-section (1) of Section 33 cannot be allowed as a deduction unless a reserve account has been created in the previous year in which the installation or first use occurs. Any doubt in so reading the provisions because of want, or insufficiency, of profit in such previous year has been removed by the Explanation to Clause (a) of Sub-section (3) of Section 34."

5. The assessment year involved herein is 1972-73. Although the assessee claimed development rebate of Rs. 8,29,641, it created development reserve of Rs. four lakhs only. The Income Tax Officer, therefore, allowed development rebate to the extent of Rs. 5,33,333 corresponding to the reserve created of Rs. four lakhs. The Appellate Assistant Commissioner, following the decision of this court in *West Laikdihi Coal Co. Ltd. Vs. Commissioner of Income Tax*, , allowed development rebate of Rs. 8,29,641 and directed the Income Tax Officer to carry forward the balance of Rs. 2,96,308 being the difference between development rebate claimed by the assessee and that allowed by the Income Tax Officer. Although the decision of the Gujarat High Court in *Addl. CIT v. Shubhlaxmi Mills Ltd.* [1975] 100 ITR 188 was relied on by the Department which has been affirmed by the Supreme Court in *Shri Shubhlaxmi Mills Limited Vs. Additional Commissioner of Income Tax, Gujarat*, , the Tribunal, however, approved the reasoning of the Appellate Assistant Commissioner. In our view, the controversy has been set at rest by the aforesaid decision of the Supreme Court in *Shri Shubhlaxmi Mills Limited Vs. Additional Commissioner of Income Tax, Gujarat*, . In order to claim the deduction on account of development rebate u/s 33(1) of the Act read with the Explanation to Clause (a) of Section 34(3), it is obligatory on the assessee to create a reserve fund in the relevant previous year in which

the machinery or plant is installed or first put to use irrespective of the result of the profit and loss account disclosed by the books of the assessee. Mere book entries will suffice for creating such a reserve fund. The debit entries and the entries relating to the reserve fund have to be made before the profit and loss account is finally drawn up. If this condition for securing the benefit of development rebate is not satisfied, the deduction on account of development rebate cannot be claimed or allowed. It may be mentioned that the Supreme Court in *Shri Shubhlaxmi Mills Limited Vs. Additional Commissioner of Income Tax, Gujarat*, overruled the decision of the Bombay High Court in *Indian Oil Corporation Ltd. Vs. S. Rajagopalan, Income Tax Officer, Companies Circle II(1), Bombay and Others*, . There, the Bombay High Court accepted the submission of the assessee that the sum "to be allowed" by way of development rebate for the assessment year shall be only such amount as shall be sufficient to reduce the total assessable income to nil and the amount of development rebate to the extent to which it has not been allowed shall be carried forward to the following eight subsequent assessment years. According to the Bombay High Court, an illusory debit, entry in the profit and loss account and an illusory credit entry in the development rebate reserve account were not contemplated. The Supreme Court, having overruled the aforesaid decision of the Bombay High Court and further having held that *West Laikdihi Coal Co. Ltd. Vs. Commissioner of Income Tax*, was decided under the provisions of the Indian Income Tax Act, 1922, and there being no Explanation such as the one appended to Clause (a) of Section 34(8) of the 1961 Act, the reasoning and conclusions of the Tribunal in the case before us cannot be sustained. The assessee, having not complied with the mandatory condition of Section 34(3), is not entitled to any development rebate or carry forward of the unabsorbed development rebate, If no development rebate is allowable, the question of carry forward of any such unabsorbed development rebate would not arise.

6. For the reasons aforesaid, both the questions in this reference are answered in the negative and in favour of the Revenue and against the assessee.

7. There will be no order as to costs.

8. Leave is given to Mr. R. N. Saha to file vakalatnama within two weeks from date, Let the paper book be given to him.

Bhagabati Prasad Banerjee, J.

9. I agree.