

(2004) 12 GUJ CK 0013

In the Gujarat High Court

Case No : IT Ref No. 42 of 1992 15th December 2004 A.Ys. 1977-78 and 1978-79 & Income Tax Reference No. 42 of 1992

Commissioner of Income Tax

APPELLANT

Vs

Pratik Prints

RESPONDENT

Date of Decision : 15-12-2004

Acts Referred:

Companies Act, 1956 — Section 617

Income Tax Act, 1961 — Section 154, 155, 155(4A), 155(5), 2(47)

Citation : (2005) 144 TAXMAN 126

Hon'ble Judges : Ms. H.N. Devani, J;H.N. Devani, J;D.A. Mehta, J

Bench : Full Bench

Advocate : Manish R. Bhatt, for the Revenue and J.P. Shah, for the Assessee, for the Appellant;

Judgement

D.A. Mehta, J.

The Tribunal, Ahmedabad Bench "A", Ahmedabad, has referred the following question for the opinion of this court u/s 256(1) of the Income Tax Act, 1961 (hereinafter referred to as the Act), at the instance of the applicant-revenue:

"Whether, on the facts and circumstances of the case, the Tribunal was right in confirming the decision of the CIT (A), Surat, holding that investment allowance could not be withdrawn u/s 155(4A) in the case of the assessee ?"

2. The assessment years are 1977-78 and 1978-79 and the corresponding accounting periods are the financial years ended on 31-3-1977, and 31-3-1978. The assessee, a partnership firm, was granted investment allowance of Rs. 1,55,293 and Rs. 81,000 for assessment years 1977-78, and 1978-79, respectively. However, the assessing officer, acting under provisions of section 155(4A) of the Act, withdrew the investment allowance originally granted on the ground that as the firm was dissolved on 31-3-1978, the assets in question had been transferred to the partner, who had taken over the same from the assessee-

firm; and the second ground was that u/s 32A(5)(b), it was not possible for the assessee-firm to utilise the reserve within the statutory period of ten years for purchasing new machinery or plant as required by the section.

3. The assessee carried the matter in appeal for both the years and succeeded before the CIT (A). The revenue carried the matter in second appeal before the Tribunal. The Tribunal, for the reasons stated in its order dated 31-12-1990, upheld the order of the CIT (A), holding that there was no justification for withdrawing the investment allowance granted to the assessee.

4. Heard the learned standing counsel for the revenue. It is submitted that when the firm was dissolved, all the assets belonging to the firm were transferred to the erstwhile partner who took over the entire business. That, in these circumstances, provisions of section 32A(5)(a) of the Act would come into play and it was required to be held that investment allowance had been wrongly granted. In the alternative, it was submitted that section 32A(5)(b) of the Act required that the assessee utilises the amount credited to the reserve account under sub-section (4) of section 32A of the Act at any time before expiry of ten years from the end of the previous year in which the machinery or plant was installed. That, in the present case, admittedly, when the firm was dissolved, it was not possible for the firm to utilise the said reserve within the statutory period of ten years and even on this count, the orders made by the assessing officer withdrawing investment allowance were required to be upheld. In support of the submissions, reliance was placed on the decision of the Supreme Court of India in the case of Commissioner of Income Tax Vs. Vajaya Productions (P) Ltd., .

5. Section 32A(5), as is relevant for the present, reads as under :

"32A(5). Any allowance made under this section in respect of any ship, aircraft, machinery or plant shall be deemed to have been wrongly made for the purposes of this Act

(a) if the ship, aircraft, machinery or plant is sold or otherwise transferred by the assessee to any person at any time before the expiry of eight years from the end of the previous year in which it was acquired or installed; or

(b) if at any time before the expiry of ten years from the end of the previous year in which the ship or aircraft was acquired or the machinery or plant was installed, the assessee does not utilise the amount credited to the reserve account under sub-section (4) for the purposes of acquiring a new ship or a new aircraft or new machinery or plant other than machinery or plant of the nature referred to in clauses (a), (b) and (d) of the proviso to sub-section (1) for the purposes of the business of the undertaking; or

(c) if at any time before the expiry of the 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 creation of any assets outside India or for any other purpose which is not a purpose of the business of the undertaking,

and the provisions of sub-section (4A) of section 155 shall apply accordingly."

5.1 Section 155(4A) of the Act reads as under :

"155(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) at any time before the expiry of eight years from the end of the previous year in which the ship or aircraft was acquired or the machinery or plant was installed, the ship, aircraft, machinery or plant is sold or otherwise transferred by the assessee to any person other than the Government, a local authority, a corporation established by a Central, State or Provincial Act or a government company as defined in section 617 of the Companies Act, 1956 (1 of 1956), or in connection with any amalgamation or succession referred to in sub-section (6) or sub-section (7) of section 32A; or

(b) at any time before the expiry of ten years from the end of the previous year in which the ship or aircraft was acquired or the machinery or plant was installed, the assessee does not utilise the amount credited to the reserve account under sub-section (4) of section 32A for the purposes of acquiring a new ship or a new aircraft or new machinery or plant other than machinery or plant of the nature referred to in clauses (a), (b) and (d) of the proviso to sub-section (1) of section 32A for the purposes of the business of the undertaking; or

(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 Income Tax Officer may, notwithstanding anything contained in this Act, recomputed 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,

(i) in a case referred to in clause (a), from the end of the previous year in which the sale or other transfer took place;

(ii) in a case referred to in clause (b), from the end of the ten years referred. to

in that clause;

(iii) in a case referred to in clause (c), from the end of the previous year in which the amount was utilised."

6. Insofar as the first submission is concerned, it is necessary that the machinery or plant is sold or otherwise transferred by the assessee to any person at any time before the expiry of eight years from the end of the previous year in which it was installed. This issue stands concluded by a decision of the Apex Court in case of *Malabar Fisheries Co. Vs. Commissioner of Income Tax, Kerala*, wherein the court was called upon to deal with identical controversy in relation to withdrawal of development rebate. In almost similar circumstances, a firm consisting of four partners carrying on six different businesses came to be dissolved and under the deed of dissolution, one of the businesses was taken over by one of the partners, while the remaining five businesses were taken over by two of the other partners. Development rebate granted to the firm was withdrawn on the ground that there was a sale or transfer of the machinery within the meaning of section 34(3)(b) read with section 2(47) of the Act. It was held that :

"Having regard to the above discussion, it seems to us clear that 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 firms assets all that is meant is property or assets in which all partners have a joint or common interest. If that be the position, it is difficult to accept the contention that upon dissolution the firms rights in the partnership assets are extinguished. The firm as such has no separate rights of its own in the partnership assets, but it is the partners who own jointly or in common the assets of the 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 of rights between the 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 (247) of the Act. In our view, therefore, there is no transfer of assets involved even in the sense of any extinguishment of the firms rights in the partnership assets when distribution takes place upon dissolution."

7. The decision in case of *CIT v. Vijaya Production* (supra) was a converse case wherein the assessee's proprietary business was converted into a partnership and the revenue withdrew the development rebate allowed to the proprietor-assessee. The Apex Court relied upon its own decision in case of *Sunil Siddharthbhai Vs. Commissioner of Income Tax, Ahmedabad, Gujarat*, and, stated that the point at issue was covered by the said decision and accordingly, reversed the decision of the Madras High Court. However, it is necessary to note that in the case of *Sunil Siddharthbhai* (supra), the contention which has been raised today was specifically raised before the Supreme Court and after referring

to the decision in the case of Malabar Fisheries (supra) and other decisions, it was held that :

"When a partner retires or the partnership is dissolved, what the partner receives is his share in the partnership. What is contemplated here is a share of the partner qua the net assets of the partnership firm. On evaluation, that share in a particular case may be realised by the receipt of only one of all the assets.

What happens here is that a shared interest in all the assets of the firm is replaced by an exclusive interest in an asset of equal value. That is why it has been held that there is no transfer. It is the realisation of a preexisting right. The position is different, it seems to us, when a partner brings his personal asset into the partnership firm as his contribution to its capital."

Therefore, the aforesaid decision representing a converse situation cannot carry the case of the revenue any further.

8. It is necessary to take note of the two decisions of the Supreme Court. In South India Steel Rolling Mills, Madras Vs. Commissioner of Income Tax, Madras, , the court upheld the action of the CIT u/s 263 of the Act withdrawing the development rebate by referring to provisions of section 33(1)(a) read with section 34(3)(a) of the Act. It was observed that the machinery or plant had to be owned by the assessee and wholly used for the purposes of the business carried on by the assessee, and further that the reserve had to be utilised by the assessee during the period of eight years for the purpose of business of the undertaking. That the said condition could not be stated to have been complied with in case of a dissolved firm. The court took note of the fact that section 155 of the Act was not invoked, but that was no reason to limit the power of the CIT u/s 263 of the Act. The earlier decision in the case of Malabar Fisheries (supra) was referred to and the court noted that it was not called upon to decide the issue in context of section 340(b) of the Act.

9. This decision came to be cited before another Bench of the Apex Court in the case of Commissioner of Income Tax, T.N. Vs. S. Balasubramanian, . The respondent therein was a coparcener of an HUF who carried on business. On a partial partition of the joint family, plant and machinery which had been the subject-matter of development rebate was allotted to two coparceners. The said two coparceners thereafter sold away to third party the plant and machinery allotted to them. The assessing officer withdrew the development rebate by invoking section 155(5) of the Act. The matter ultimately travelled upto the Supreme Court and the apex Court, after reiterating the principles laid down in case of Malabar Fisheries (supra), held that there was no transfer of assets by the HUF to its coparceners : on partition. It was further held that in view of the unity of ownership and community of interest of all coparceners in a joint Hindu family business, the position on partition of the joint Hindu family business, whether it be partial or complete, is very similar in law to the position on dissolution of a partnership firm. However, the court, after referring to the earlier

decision in case of South India Steel Rolling Mills (supra), held that the power vested in the assessing officer u/s 155(5) had to be exercised in accordance with the provisions of the said section and only if the circumstances which are required to exist are shown to be existing. It was further observed that because the coparceners sold the machinery to third party, the condition regarding user u/s 33 of the Act was not fulfilled and hence, the provisions of section 155(5) of the Act were rightly invoked. At the same time, it was held that in case of Malabar Fisheries (supra), the said question was never raised because, possibly, the machinery remained with the partners who were allotted the same on dissolution.

10. In the present case also, it is not even the case of the revenue that the machinery which was allotted to the partners on dissolution was subsequently transferred within the statutory period and hence, the ratio in case of Malabar Fisheries (supra), as reiterated by the Apex Court in the case of S. Balasubramanian (supra), would apply on all fours.

11. It is necessary to note that in a subsequent decision in the case of Commissioner of Income Tax Vs. Dalmia Magnesite Corpn., Salem, the Apex Court has once again reiterated the position that power u/s 155(5) of the Act could not be invoked in case of dissolution of a firm, because there was no transfer of plant by the assessee-firm. This was a case where the dissolution was automatic on death of one of the partners when the firm was constituted by only two partners.

12. Insofar as clause (b) of sub-section (5) of section 32A is concerned, it is stipulated that investment allowance shall be deemed to have been wrongly granted if at any time within the specified period of ten years, the assessee does not utilise the amount credited to the reserve account. The revenue contends that in case of the assessee, on dissolution, it is not able to utilise the amount credited to the reserve account and hence it be held that the investment allowance was wrongly granted. This submission cannot be accepted on a plain reading of the provisions.

13. As can be seen from the clause (a) of sub-section (5) of section 32A of the Act, it requires that machinery or plant is sold or otherwise transferred by the assessee to any person. Meaning thereby, the assessee in question has to be in existence and there has to be an overt act on the part of the assessee in selling or transferring the asset in question. Similarly, clause (b) requires that the assessee does not utilise the amount credited to the reserve account. In this clause also, the language employed by the legislature goes to show that there has to be a positive act by the assessee concerned. The same position prevails in clause (c) where an assessee is required to utilise the amount credited to the reserve account for specified purposes only. In other words, if clauses (b) and (c) are read together, the legislative intent appears to be that an assessee has to either positively utilise the reserve for specified purposes or it fails to utilise the reserve within the statutory period. But in both the situations, existence of the

assessee is a prerequisite condition, i.e., the assessee who was granted investment allowance and from whose hands the withdrawal is to be made by the revenue u/s 155(4A) of the Act.

14. This position becomes abundantly clear when one goes to section 155(4A) wherein the period of limitation is prescribed for all the three situations envisaged by clause (a), (b) or (c), respectively. In the case referred to in clause (a), the period of four years has to be reckoned from the end of the previous year in which the sale or transfer took place; in the case referred to in clause (b), the period of limitation has to be reckoned from the end of the ten years referred to in that clause; and in the case referred to in clause (c), from the end of the previous year in which the amount was utilised. Therefore, even for invoking clause (b) of sub-section (5) of section 32A of the Act, it is necessary that in case of an existing assessee, the period of ten years has to be reckoned before the said provision can be invoked. But, where the assessee itself does not exist, it is not possible to state that the assessee has not utilised or assessee does not utilise within the statutory period. The revenues contention, therefore, that alternatively the withdrawal of investment allowance should be confirmed in light of section 32A(5)(b) of the Act does not merit acceptance.

15. However, it is also necessary to note that on facts, the Tribunal has taken cognizance of the fact that the reserve pertaining to assessment year 1977-78 was utilised for purchase of machineries in the immediate succeeding accounting period when the assessee was in existence and the reserve relating to assessment year 1978-79 was utilised by the partner, who took over the business for purchasing machinery in the immediate succeeding year.

16. In the result, there being no infirmity in the order of the Tribunal, the question referred for the opinion of this court is answered in the affirmative, i.e., in favour of the assessee and against the revenue.

17. The reference stands disposed of accordingly. There shall be no order as to costs.