
(1982) 02 AHC CK 0003

In the Allahabad High Court

Case No : Income-tax Reference No. 112 of 1978

Commissioner of Income Tax

APPELLANT

Vs

Shankar Cold Storage

RESPONDENT

Date of Decision : 09-02-1982

Acts Referred:

Income Tax Act, 1961 — Section 263, 80J, 80J(4)

Citation : (1982) 28 CTR 277 : (1982) 138 ITR 286 : (1982) 9 TAXMAN 253

Hon'ble Judges : R.R. Rastogi, J;K.N. Seth, J

Bench : Division Bench

Advocate : M. Katju and S.B.L. Srivastava, for the Appellant;

Judgement

Rastogi, J.—The Income Tax Appellate Tribunal, Allahabad Bench, Allahabad, has referred the following question for our opinion :

"Whether, on the facts and in the circumstances of the case, the I.T.A.T. was justified in holding that it is not a case of "reconstruction" of a business already in existence and that the assessee is entitled to deduction u/s 80J of the Income Tax Act, 1961 ?"

2. The facts giving rise to this reference, briefly stated, are that the respondent-assessee had purchased a cold storage plant which business was being run under the name and style of M/s. Shankar Industries, Faizabad Road, Lucknow, on February 1, 1970. The purchase price was Rs. 1,44,647, the details of which were as under :

Rs.

1.

Land

6,000

2.

Building

69,347

3.

Machinery

69,300

Rs. 1,44,647

3. After purchasing this cold storage plant, the assessee started its reconstruction from September 1, 1970. The cost of the new construction came to Rs. 2,00,421, excluding the cost of land. Some material of the old building was also utilised in making this construction. As for the old machinery, some was sold for a sum of Rs. 38,880 and a part, the opening value of which was Rs. 15,200, was utilised in the newly constructed plant.

4. In its assessment to Income Tax for the assessment year 1972-73, the assessee furnished all the relevant details before the ITO and claimed deduction of a sum of Rs. 15,715 u/s 80J of the Act. The ITO accepted the assessee's contention and allowed the deduction claimed. Subsequently, the Commissioner took action u/s 263 of the Act, since he was of the opinion that the requisite conditions stipulated under Sub-section (4) of Section 80J had not been satisfied and the deduction allowed was erroneous in law, and a notice to that effect was issued to the assessee. Pursuance that notice the assessee filed its reply. It appears that the Commissioner referred the matter of valuation to the valuer and, on the basis thereof, concluded that a substantial portion of old material and old machinery had been utilised by the assessee in the process of reconstruction of the cold storage. That being so, he held that this new cold storage had been formed by the splitting up, or reconstruction, of the existing cold storage and, consequently, the assessee was not entitled to the deduction claimed u/s 80J of the Act. The deduction allowed was hence withdrawn and the ITO was directed to revise the assessment.

5. Aggrieved, the assessee filed an appeal before the Appellate Tribunal. The Tribunal has, in the first instance, taken the view that it was not a case which could be reviewed u/s 263 of the Act because the assessee had furnished all the relevant materials and details at the time of the assessment itself before the ITO. Apart from this, the assessee filed the details of the sale of the old machinery as also: of: the total investment in the new cold storage. The entire investment came to Rs. 2,39,939. The Appellate Tribunal also accepted the assessee's contention that the assessee had sold old machinery of the value of Rs. 38,880. It purchased new machinery of the value of Rs. 63,963 and utilised old machinery of the value of Rs. 15,000. Thus, in the opinion of the Appellate Tribunal, the old assets utilised were below 20 per cent. of the total assets of the new cold storage and, therefore, the deduction allowed earlier: could not be withdrawn.

6. It was submitted before us on behalf of the department by its learned counsel, Sri M. Katju, that Section 80J applies only to a new undertaking and since in the instant case the undertaking came into existence as a result of reconstruction of the old undertaking, this provision would not be attracted. According to the learned counsel, the assessee could have claimed development rebate and depreciation only. It could not have claimed any deduction u/s 80J(4).

7. After hearing counsel, We do not find much substance, in this submission. Section 80J provides, for a deduction in respect of profits and gains from newly established undertakings or ships or hotel business in certain cases. The provisions relating to allowance of depreciation and development rebate operate in different spheres and they do not overlap. For a deduction u/s 80J the claim for depreciation and development rebate would not come in the way. If the new industrial undertakings, ships and hotels fulfil the conditions prescribed in Section 80J, the profits from them are entitled to exemption from Income Tax to the extent of six per cent. on the capital employed. The benefit is thus confined only to the profits from the new industrial undertakings. In other words the question of granting deduction under this section would arise only if after setting off the unabsorbed depreciation and the carried forward loss of past years any taxable income remains.

8. Now, it is Sub-section (4) of this section which is relevant for our purposes. That sub-section, in so far as it is relevant for our purposes, reads as under :

"(4) This section applies to any industrial undertaking which fulfils all the following conditions, namely:--

(i) it is not formed by the splitting up, or the reconstruction, of a business already in existence ;

(ii) it is not formed by the transfer to a new business of machinery or plant previously used for any purpose ;

(iii) it manufactures or produces articles, or operates one or more cold storage plant or plants, in any part of India, and has begun or begins to manufacture or produce articles or to operate such plant or plants, at any time within the period of thirty-three years next following the 1st day of April, 1948, or such further period as the Central Government may, by notification in the Official Gazette, specify with reference to any particular industrial undertaking ;

(iv) in a case where the industrial undertaking manufactures or produces articles, the undertaking 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 :.....

Explanation 2.--Where in the case of an industrial undertaking, any machinery or plant or any part thereof previously used for any purpose is transferred to a new business and the total value of the machinery or plant or part so transferred does not exceed twenty per cent. of the total value of the machinery or plant used in

the business, then, for the purposes of Clause (ii) of this sub-section, the condition specified therein shall be deemed to have been complied with and the total value of the machinery or plant or part so transferred shall not be taken into account in computing the capital employed in the industrial undertaking."

9. Under this provision, one of the conditions is that if an industrial undertaking is formed by "the splitting up or the reconstruction of a business already in existence", this benefit will not be available. In the Instant case it is not averred by the Revenue that there was any splitting up of the business already in existence. The case is of reconstruction. The term "reconstruction" implies that the identity of the business should not be lost, and substantially the same business should be carried on by substantially the same persons. If the business is sold or if its very nature is changed, it will not be a case of reconstruction. In the present case the business already in existence was sold and substantial expansion and extension has been made by the assessee therein. Another finding is that the total value of the machinery and material of the old plant does not exceed 20 per cent. of the total value of the machinery and material used in the new business. In *Commissioner of Income Tax Vs. Indian Aluminium Co. Ltd.*, , a substantial expansion or extension of an existing undertaking or a new unit in the vicinity or at a different place to manufacture the same product which was produced in the existing business was held as sufficient to qualify for relief under this section as a new industrial undertaking. In this connection reference may also be made to *Commissioner of Income Tax Vs. Ganga Sugar Corporation*, and *Commissioner of Income Tax, Bombay City-I Vs. Gaekwar Foam and Rubber Co. Ltd.*, . As observed in *Ganga Sugar Corporation Ltd.*, in the reconstruction of a business, as in the reconstruction of a company, there is an element of transfer of assets and of some change, however partial or restricted it may be, of ownership of the assets. It is none, the less imperative that there should be continuity and preservation of the old undertaking though in an altered form. The object of this provision is to provide an incentive for the setting up of new industries so as to accelerate the process of industrialisation. The expression "splitting up or reconstruction of business already in existence" must be, understood in a broad commercial sense from a common sense point of view because the purpose of the provision is to encourage the setting up of new industries : vide *Commissioner of Income Tax Vs. Orient Paper Mills Ltd.*, . If the new undertaking is formed by the transfer of second-hand assets, Explan. 2 to Sub-section (4) may be invoked and on the facts found by the Tribunal it has been rightly invoked.

10. We, therefore, answer the question referred in the affirmative, in favour of the assessee and against the department. The assessee is entitled to costs which are assessed at Rs. 250.