

(1981) 11 CAL CK 0015

In the Calcutta High Court

Case No : Income-tax Reference No. 184 of 1977

Commissioner of Income Tax

APPELLANT

Vs

Texmaco Ltd.

RESPONDENT

Date of Decision : 02-11-1981

Acts Referred:

Income Tax (Computation of Capital of Industrial Undertakings) Rules, 1949 — Rule 3(1)
Income Tax Act, 1922 — Section 10(5), 15C
Income Tax Act, 1961 — Section 43(6)

Citation : (1982) 29 CTR 64 : (1983) 141 ITR 531

Hon'ble Judges : Sabyasachi Mukharji, J;C.K. Banerji, J

Bench : Division Bench

Advocate : B.L. Pal and Ajit Sengupta, for the Appellant; R.N. Bajoria, A.K. De and S. Pal, for the Respondent

Judgement

Sabyasachi Mukharji, J.—This reference u/s 256(1) of the I.T. Act, 1961, arises out of the assessment for the assessment year 1956-57. The following question has been referred to us :

"Whether, on the facts and in the circumstances of the case, the Tribunal was justified in law in holding that for the purpose of computing the capital employed u/s 15C of the Indian Income Tax Act, 1922, the written down value had to be worked out without deducting therefrom the initial depreciation ?"

2. The only point involved in this reference relates to the ITO's action in computing the capital employed u/s 15C of the Indian I.T. Act, 1922, on the basis of written down value of fixed assets as on January 1, 1955, as reduced by the initial depreciation allowed for the various years. The facts of the case are that the Tribunal had directed the ITO to give relief to the assessee under s, 15C of the Indian I.T. Act, 1922, and compute the capital employed for the purpose in accordance with the rules. The ITO computed the capital as stated above and the assessee was aggrieved by the reduction of the written down value of the fixed

assets by the initial depreciation. It was suggested before the AAC that the Bombay High Court had held in the case of *Burmah-shell Refineries Ltd. Vs. G.B. Chand, Income Tax Officer, Co. Cir. II (1), Bombay and Others*, , to which we shall presently refer, that for the purpose of computing the capital employed u/s 15C of the 1922 Act, the written down value had to be worked out without deducting therefrom the initial depreciation. The AAC accepted this view and further held that it was at best a debatable issue and, therefore, the ITO should not have computed the capital in the manner done.

3. Aggrieved by the said decision of the AAC, the Department went up in appeal. The first contention was the applicability of Section 35 of the old Act in rectifying the mistake. As this has not been referred to us, we need not detain ourselves on this aspect of the matter. The Tribunal in its order observed as follows ;

"We agree with the submissions made by the assessee's counsel. Only when the asset is sold or when the aggregate of all the allowances including that of initial depreciation exceeds the original cost that initial depreciation is to be taken into account. Otherwise, for the purpose of computing written down value, the provisions of Section 10(2)(vi) clearly enjoin upon the Income Tax Officer not to take into account initial depreciation. The written down value for assessment purposes, therefore, should also be taken as for computation of capital u/s 15C. If prior to the relevant date of commencement of the accounting period, the asset happens to be sold, then the question of taking it into account for the purpose of capital computation does not arise. If the aggregate of the allowances including initial depreciation exceeded the original cost prior to the date of commencement of the accounting period and the written down value was worked out by the Income Tax Officer for assessment purposes at zero, then again the Income Tax Officer would naturally take the same written down value for the computation of the capital. Except for the two contingencies, there is no warrant for reducing the capital employed by initial depreciation in the manner done by the Income Tax Officer. We may rely upon the observations of the Bombay High Court at pages 67 ITR 660. We, therefore, agree with the conclusion reached by the Appellate Assistant Commissioner that the Income Tax Officer was wrong in reducing the capital employed by initial depreciation....."

4. The other aspect, as we have mentioned, is not relevant for our purposes. In those circumstances, the question, as indicated above, has been referred to us. Therefore, we are concerned with the question as to the nature of the initial depreciation and whether that should be taken into consideration in computing the capital employed for the purpose of giving relief u/s 15C of the Indian I.T. Act, 1922. The relevant portion of Section 15C provided as follows :

"15C. Exemption from tax of newly established industrial undertakings.--(1) Save as otherwise hereinafter provided, the tax shall not be payable by an assessee on so much of the profits or gains derived from any industrial undertaking or hotel to which this section applies as do not exceed six per cent. per annum on the capital employed in the undertaking, or hotel, computed in accordance with such

rules as may be made in this behalf by the Central Board of Revenue....."

5. As mentioned hereinbefore, the computation of capital necessary for this purpose for giving relief had to be done in accordance with such rule as might be made in that behalf by the CBR. Such rules were made by the Indian Income Tax (Computation of Capital of Industrial Undertakings) Rules, 1949, Relevant portion of Rule 3 of the said Rules provided, inter alia, as follows :

"3. (1) For the purpose of s. 15C of the Act, the capital employed in an undertaking to which the said section applies shall be taken to be --(a) in the case of assets acquired by purchase and entitled to depreciation-

(i) if they have been acquired before the computation period, their written down value on the commencing date of the said period ;

(ii) if they have been acquired on or after the commencing date of the computation period, their average cost during the said period....."

6. It would also be relevant for our purpose to refer to Section 10(5) which provides for the different meanings, namely, the expressions "paid", "plant", "scientific apparatus" and "surgical equipment" and the meaning of " written down value ". The relevant portion of Sub-section (5) of Section 10 provides, inter alia, as follows :

"10. (5) In Sub-section (2), "paid" means actually paid or incurred according to the method of accounting upon the basis of which the profits or gains are computed under this section; "plant" includes vehicles, books, scientific apparatus and surgical equipment, purchased for the purposes of the business, profession or vocation; and " written down value" means-

(a) in the case of assets acquired in the previous year, the actual cost to the assessee :

Provided that where, before the date of acquisition by the assessee, the assets were at any time used by any other person for purposes of his business and the Income Tax Officer is satisfied that the main purpose of the transfer of such assets, directly or indirectly to the assessee, was the reduction of a liability to Income Tax (by claiming depreciation with reference to an enhanced cost), the actual cost to the assessee shall be such an amount as the Income Tax Officer may, with the previous approval of the Inspecting Assistant Commissioner, determine having regard to all the circumstances of the case :

Provided further that where before the date of acquisition by the assessee, the assets, which belonged to the assessee and had been used by him for the purposes of his business, profession or vocation, had ceased to be his property by reason of transfer or otherwise the actual cost to the assessee shall be the actual cost to him when he first acquired the assets less all depreciation actually allowed to him under the Act or under any Act repealed hereby or under executive orders issued when the Indian Income Tax Act, 1886 (II of 1886), was

in force....."

7. We have to bear in mind that under the scheme of the old Act in Sub-section (5) of Section 10 these definitions provided for computation of the profits and gains of the business. Sub-section (2) of Section 10 makes the position clear. While on this aspect it may be appropriate to refer to the new Act which has kept in substance the same provisions but under different sections. These computations are provided under Sections 28 to 41 of the I.T. Act, 1961, and Section 29 of the 1961 Act stipulates that the income referred to in Section 28, that is to say, profits and gains of business, should be computed in accordance with the provisions contained in Sections 30 to 43A of the I.T. Act, 1961. Section 43, Sub-section (6) provides the meaning of the written down value. Sub-section (6) of Section 43, stipulates as follows :

"(6) "Written down value" means-

(a) in the case of assets acquired in the previous year, the actual cost to the assessee ;

(b) in the case of assets acquired before the previous year, the actual cost to the assessee less all depreciation actually allowed to him under this Act, or under the Indian Income Tax Act, 1922 (XI of 1922), or any Act, repealed by that Act, or under any executive orders issued when the Indian Income Tax Act, 1886 (II of 1886), was in force : "

8. By an amendment introduced retrospectively by Section 6 of the 2nd Finance Act, 1965, a proviso was added which stipulates as follows :

"Provided that in determining the written down value in respect of buildings, machinery or plant for the purposes of Clause (ii) of subsection (1) of Section 32, "depreciation actually allowed" shall not include depreciation allowed under Sub-clauses (a), (b) and (c) of Clause (vi) of Sub-section (2) of Section 10 of the Indian Income Tax Act, 1922 (XI of 1922), where such depreciation was not deductible in determining the written down value for the purposes of the said Clause (vi)....."

9. The purpose of this amendment has been explained in the notes on clauses of the Finance Act No. 2 of 1965, which can be found at p. 57 of the statutes portion of 57 ITR. Clause 6 which deals with this proviso states that Clause 6 was meant to amend retrospectively its effect and further clarifies that the effect of the amendment would be that in determining the written down value of buildings, machinery or plant for the purpose of calculating normal depreciation u/s 32(1)(ii) of that Act, the initial depreciation, if any, allowed on such assets u/s 10(2)(vi) of the Indian I.T. Act, 1961, would not be deductible. Thus this amendment restored the position as it existed prior to the commencement of the I.T. Act, 1961. According to the notes on clauses, in order to determine whether the initial depreciation should be deducted in computing capital for granting relief it must be understood why depreciation is taken into consideration in granting

relief. This has been explained by the Supreme Court in the case of P.K. Badiani Vs. The Commissioner of Income Tax, Bombay, . There the Supreme Court was dealing with the development reserve created by the company by duly charging the amount to the profit and loss account, although the rebate was allowable as a deduction under the Act, constituted "accumulated profits" of the company within the meaning of Section 2(6A)(e) of the Act. It was held by the Supreme Court that for the purpose of assessing to tax the amounts advanced by a private company to the assessee who was a major shareholder and also its managing director, as "dividend" u/s 2(6A)(e) of the Indian I.T. Act, 1922, development reserve created out of its profits constituted part of the accumulated profits of the company. Then the Supreme Court explained the expression "accumulated profits" but we are really not concerned with this aspect of the matter. The Supreme Court went on to observe that the term "profits" occurring in Section 2(6A)(e) means profits in the commercial sense, that was to say, the profits made by the company in the usual and true sense of the term. The Supreme Court further observed that the allowance of initial depreciation or development rebate, unlike normal depreciation, is in no sense a deductible item of cost or expenditure in the process of settlement of the commercial profits, although it did not form part of the assessable profits, undoubtedly it did form part of the commercial prompts. Explaining the nature of initial depreciation, the Supreme Court observed, inter alia, at p. 647 of the report, as follows :

"Depreciation allowance has been allowed to be deducted from the assessable profits of an assessee u/s 10(2)(vi) of the 1922 Act, corresponding to Section 32 of the 1961 Act. It would appear from the report of the Taxation Enquiry Commission 1953-54, Vol. II, as to what is the nature of the depreciation allowance : vide Chapter V, page 74. The normal depreciation provided in Clause (vi) and the additional depreciation mentioned in Clause (via) of Section 10(2) of the 1922 Act, is permitted to be deducted from the "written down value". By and large, the cost of replacements is allowed as deductions in lieu of depreciation in respect of certain assets. By the amendments made by the Income Tax (Amendment) Act, 1946, the Finance Act, 1955, and the Finance Act, 1956, certain initial depreciation was allowed in respect of buildings newly erected or the machinery and plant newly installed. Obviously, it was by way of an incentive for the new structures or the new installations. The amount of initial depreciation was not deductible in determining the "written down value" although under proviso (c) it was to be taken into account in the aggregate of all allowances so as not to permit them to exceed the maximum limit provided therein. Development rebate was provided in Clause (vib) with effect from 1st April, 1955, by the Finance Act of 1955. There was an overlapping period of about two years in relation to the allowance of initial depreciation or the development rebate. But as provided for in Clause (vi) an assessee could not have had both even in regard to that period. Although initial depreciation and development rebate were not identical as they differed in some material particulars, they were similar in nature as both were by way of incentive for installation of new

machinery or plant. The initial depreciation or the development rebate was to be allowed, as the case may be, at a certain percentage of the actual cost of the machinery or the plant for the year of installation only. It was not a recurring allowance for the subsequent years like the allowance of the normal depreciation or the additional depreciation. The Taxation Enquiry Commission in its report aforesaid had recommended in Chapter VII, page 98 of Volume II, for assisting the expansion and development of productive enterprise by allowing them a proportion of new investment in fixed assets to be charged to current costs of production thereby permitting the taxable profits to be brought down to that extent. In the Finance Act of 1955, a provision was made to allow a development rebate of 25% of the cost of all new plant and machinery installed for business purposes instead of the then existing initial depreciation allowance of 20%. It would thus be seen that by way of an incentive for installation of new machinery and plant, initial depreciation allowance of 20% was replaced by a development rebate of 25%. But it was, like grant of export rebate by way of incentive to make more exports, in the nature of an incentive for setting up new machineries and plants. We do not find any warrant for accepting the contention of Mr. Rajgopal that the initial depreciation or the development rebate was allowed as an extra deductible allowance of business expenses in the year of installation of new machinery for meeting the ever increasing cost of replacement in future years. In our opinion, it was meant merely to reduce the tax liability of the assessee in order to give him an incentive to install new machineries or plants."

10. From the aforesaid observations of the Supreme Court it is clear that initial depreciation was given in order to give an incentive to install new machinery or plant; in other words, it was treated more or less in the same manner as development rebate. Keeping that purpose in view, we have to construe the expression used in this case. This precise question came up for consideration before the Bombay High Court in the case of *Burmah-shell Refineries Ltd. Vs. G.B. Chand, Income Tax Officer, Co. Cir. II (1), Bombay and Others*, . There what happened was that the ITO had computed the capital employed in an undertaking for the purpose of granting relief to the assessee u/s 15C of the Indian I.T. Act, 1922, on the basis of the written down value of the assets as per the Income Tax records without deducting initial depreciation from the written down value and subsequently sought to rectify it u/s 154 of the I.T. Act, 1961, on the ground that there was an "error apparent from the record" as the initial depreciation was not deducted. It was held that *prima facie* the initial depreciation was not to be deducted from the written down value for the purpose of computing capital employed in an industrial undertaking for giving relief u/s 15C of the Indian I.T. Act, 1922. The Bombay High Court further held that in any case, whether this was to be deducted or not was a question of substance and was not an error apparent on the face of the record to attract Section 154 of the Act. We are, however, not concerned with this aspect of the matter but it is instructive to refer to the reasonings of the Bombay High Court. The Bombay High Court referred to Section 154 of the I.T. Act, 1961, and also to the relevant

Rules, namely, Indian Income Tax (Computation of Capital of Industrial Undertakings) Rules, 1949, which we have set out hereinbefore. The Bombay High Court noted the opening words of Rule 3(1)(a) and spoke of "assets.....entitled to depreciation" and then observed that if they had been acquired before the computation period, the capital employed would be "their written down value on the commencing date of the said period". Though the Rules purported to define "depreciation" and "written down value", these did not actually carry the definition much further; it merely referred one back to Section 10(2), Clauses (vi) and (via) of Section 10(5). Then the court referred to Section 10(2)(vi), which provides that such profits or gains should be computed after making the following allowances, namely, in respect of depreciation of such buildings, machinery, plant or furniture being the property of the assessee, a sum equivalent, where the assets are ships other than ships ordinarily plying on inland waters, to such percentage on the original cost thereof to the assessee as may in any case or class of cases be prescribed and, in any other case, to such percentage on the written down value thereof as may in any case or class of cases be prescribed. However, we are not concerned with this. Clause (via) of Section 10(2) provides, inter alia, as follows :

"(via) in respect of depreciation of buildings newly erected, or of machinery or plant being new which has been installed, after the 31st day of March, 1948, a further sum (which shall be deductible in determining the written down value), equal to the amount admissible under Clause (vi) (exclusive of the extra allowance for double or multiple shift working of the machinery or plant and the initial depreciation allowance admissible under that clause for the first year of erection of the building or the installation of the machinery or plant, in not more than five successive assessments for the financial years next following the previous year in which such buildings are erected and such machinery and plant installed and falling within the period commencing on the 1st day of April, 1949, and ending on the 31st day of March. 1959."

11. The Bombay High Court referred to Sub-section (2) of Section 10 of the Indian IT. Act, 1922, for the meaning of the written down value. Reliance was placed on Clause (b) of Section 10(5) and the ITO held that the "written down value" for the purpose of computing capital employed u/s 15C would be "less all depreciation". Therefore, it was emphasised that the initial depreciation granted u/s 10(2)(vi) should not have been taken into account. On behalf of the assessee, however, reliance was placed upon the second part of Section 10(2)(vi) and specially upon the words in brackets in that clause, namely, "which shall however not be deductible in determining the written down value for the purposes of this clause". It was urged that initial depreciation was not depreciation at all in the true sense of that term and, therefore, Section 10(5) would not be attracted. According to The Department, Section 10(2)(vi) did not apply at all and the computation upon rectification made only u/s 10(5) without reference to the provisions of Section 10(2)(vi) was correct. The Bombay High Court noted that the interpretation must be guided and controlled by Section 15C

under which Rules were made. Section 15C required that the capital employed in the undertaking had to be computed and understood in accordance with the Rules made in this behalf by the CBR. Rule 3(1)(a) provides that the capital employed in an undertaking to which Section 15C of the Act applies should be taken to be the assets acquired by purchase and entitled to depreciation, the written down value on the commencing date of the "said period". The words "said period" have been explained in that case but we are not concerned with that expression in this case. Then the Bombay High Court referred to the argument and observed at p. 661 of the report as follows :

"Prima facie, and we deliberately say that whatever we are deciding here is, only prima facie, for we are not called upon to decide it, the contention cannot be upheld. Section 10(5) begins with the words " In subsection (2)....." written down value" means". We cannot overlook the plain import of these words. After describing all the allowances in Section 10(2), the legislature intended to define "written down value" for the purposes of the section. Of course, the words do not occur in Subsection (1) but only in the subsequent clause. Therefore, it was with specific reference to Sub-section (2) that the definition was made and we do not suppose that, if Clause (vi) of Sub-section (2) of Section 10 was intended to be excluded, Section 10(5) would have been so generally worded as to apply to Sub-section (2) as a whole, nor do we think because the words in the brackets "which shall, however, not be deductible in determining the "written down value" for the purposes of this clause" are used in the second part of Section 10(2)(vi), that, therefore, the definition of "written down value" in Section 10(5) is excluded. Nowhere is that exclusion-indicated either expressly or by implication and it is a cardinal rule of interpretation of statutes that every part of a statute must be given a meaning if possible. Considering the two provisions, we can see no difficulty in giving effect to both the provisions.

12. In this connection, the legislative history of this section was also stressed. Clause (b) of Section 10(5) was included in the Indian Income Tax Act by the Indian Income Tax (Amendment) Act (23 of 1941). The provision of Section 10(5) (b), which includes within the meaning of " written down value " the depreciation allowed to an assessee, was already there, long before the various categories of allowances contemplated in the second part of Clause (vi) and Clauses (via), (vib) and (vii) were even contemplated. All these new forms of allowances came into force later and particularly the allowance of initial depreciation was introduced by the Indian Income Tax (Amendment) Act (8 of 1946), but the words in Section 10(5) denning " written down value " to include in the case of assets acquired before the previous year, all depreciation actually allowed to an assessee continued to operate throughout. Notwithstanding that provision of law, express provision was made in the second part of Clause (vi) of Section 10(2) not permitting deduction of the allowance on initial depreciation in determining the written down value for the purposes of that clause. Therefore, it is clear that the legislation made a specific provision not permitting the initial depreciation to be deducted in determining the written down value. Mr. Palkhivala urged that

there was a specific reason for doing this, because the initial depreciation was really a sort of a concession granted to an assessee who undertook the erection of new machinery or plant and in order to encourage the investment of new capital and that really this allowance hardly partook of the nature of "depreciation". He also pointed to the fact that this initial depreciation was discontinued by the provisions of the Act itself from the very next year after the development rebate was introduced by Clause (vib). The fact that initial depreciation was substituted by its equivalent, "the development rebate", is significant. It highlights the true nature of initial depreciation. He urged, therefore, that really initial depreciation was in the nature of a development rebate, and did not partake of the nature of depreciation at all. In fact, the amendment of the legislation shows that development rebate "substituted" initial depreciation". In this respect, he referred us to a passage from the Budget Speech of the Finance Minister for the year 1955-56."

13. The High court considered the argument and was unable to accept the contention that the provisions of Section 10(2)(vi) could be read so that Section 10(5) would override or control its provisions but the court observed that it seemed to them that a specific provision was made in Section 10(2) because of the special nature of the allowances granted by that clause and the bracketed words were not limited to that sub-section only. The Bombay High Court went on to observe at p. 663 of the report as follows: "Having considered the provisions of the section, we may now turn back to the Rules and the definitions of "depreciation" and "written down value" given in Rule 2(iv) and (v), respectively, show that Section 10(2) is not isolated nor are its provisions confined to only that sub-section but have to be read as part of the entire section and in conjunction with the other provisions of this section. Though no doubt, therefore, " written down value" is defined in Rule 2(v) to mean the written down value computed under Sub-section (5) of Section 10 of the Act, that definition must be read in its turn subject to the provisions of Section 10(2)(vi) second part, where initial depreciation is concerned. We may also point out that additional depreciation, which was made allowable by the introduction of Clause (via), is again expressly stated to be deductible in determining the written down value and this express statement, in contrast to the contrary express statement in Section 10(2)(vi), second part, highlights the effect of the words in the latter clause. Where an express provision is made not permitting deduction from written down value, we can hardly hold upon the provisions of Section 10(5) that, notwithstanding that provision, it must be included in the written down value."

14. Thereafter the Bombay High Court referred to the three decisions, namely, the decision in the cases of Motor House (Gujarat) Ltd. Vs. Commissioner of Income Tax, Bombay City I, , Popular Ltd., Madurai Vs. Commissioner of Income Tax, Madras, and Asoka Mills Co. Ltd. Vs. Commissioner of Income Tax, Delhi, Ajmer, Rajasthan and Madhya Bharat, . The High Court was of the view that the said decisions did not deal with the actual question and, therefore, could not

throw so much light on the matter nor did it express the view that the initial depreciation should not be deducted from the written down value for the purpose of the computation of capital of an industrial undertaking for giving relief u/s 15C of the Act. This view seems to us, with great respect, to be in consonance with Section 15C of the Act and we are in respectful agreement with the Bombay High Court. We are of the opinion that it would be more correct to read different provisions together and not in isolation, as contended for on behalf of the Revenue. The other two decisions on which reliance was placed on behalf of the Revenue, namely, the decisions in the case of Asoka Mills Co. Ltd. Vs. Commissioner of Income Tax, Delhi, Ajmer, Rajasthan and Madhya Bharat, and in the case of Motor House (Gujarat) Ltd. Vs. Commissioner of Income Tax, Bombay City I, , are distinguishable and the grounds upon which the Bombay High Court had distinguished these decisions have appealed to us and we are in respectful agreement with the view taken by the Bombay High Court.

15. We have mentioned before that the amendment was meant to restore the position as it was under the 1922 Act. The position after 1961 amendment was considered by the Madras High Court in the case of Commissioner of Income Tax Vs. Lucas-T.V.S. Limited (No. 1), and the Madras High Court was of the view that a combined reading of Rule 19(1) and (6) of the I.T. Rules, 1962, with Section 43(6) of the I.T. Act, 1961, clearly showed that initial depreciation was not to be deducted in computing the written down value of assets for computing the capital employed by a newly established undertaking for the purpose of determining the deduction u/s 84 (now Section 80J) of the Act.

16. In our opinion, the interpretation sought to be given for and on behalf of the Revenue would defeat the purpose of the amendment and also result in an anomalous position. In that view of the matter we are of the view that the Tribunal had arrived at the correct decision.

17. In our opinion, the question must be answered in the affirmative and in favour of the assessee and each party to pay and bear its own costs.

C.K. Banerji, J.

I agree.