
(1993) 09 CAL CK 0023
In the Calcutta High Court
Case No : IT Reference No. 74 of 1990

S.P. Jaiswal Estates (P.) Ltd.

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 22-09-1993

Acts Referred:

Finance Act, 1966 — Section 2, 2(7)(d)
Finance Act, 1978 — Section 2(7)(c), 8(3)(b)
Finance Act, 1982 — Section 2(7)(c)
Income Tax Act, 1961 — Section 143(3), 256(1), 32A, 32AB

Citation : (1994) 73 TAXMAN 320

Hon'ble Judges : Shyamal Kumar Sen, J;Ajit K. Sengupta, J

Bench : Division Bench

Judgement

Ajit K. Sengupta, J.—In this reference u/s 256(1) of the income tax Act, 1961, made at the instance of the assessee, the following questions have been referred to this Court: 1. Whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that the company was not an industrial company mainly engaged in manufacture of goods?

2. Whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that the rate of income tax applicable to the company will be that applicable to a non-industrial company?

This reference relates to the income tax assessment of the assessee-company for the previous year ending on 26-10-1981 corresponding to the assessment year 1982-83. The assessee-company runs a 5-Star hotel in Calcutta styled "Hotel Hindusthan International". The only issue involved in this reference relates to the rate of income tax chargeable on the total income of the assessee-company for the year under reference. The ITO charged tax at the rate of 65 per cent by treating the assessee as a non-industrial company. This order was confirmed in appeal by the Commissioner (Appeals) as well as by the Tribunal. The case of the assessee is that it is an industrial company and it should be charged to tax at the

rate of 60 per cent which is applicable to an industrial company under the Finance Act, 1982. At the outset we would like to mention that this Court has considered the case of the assessee-company in the context of its claim for investment allowance u/s 32AB of the Act in respect of the assessment year 1981-82. There the question was whether the Tribunal was justified in law in holding that preparation of food in the hotel constituted manufacture or production of any article or thing within the meaning of section 32A of the Act and in that view whether the assessee was entitled to get investment allowance under that section. This Court held that an assessee who claims an investment allowance u/s 32A has to be an industrial undertaking carrying on the business of manufacturing and producing any article or thing. The business of a hotel is distinct and separate from an industrial undertaking manufacturing or producing articles. Though a hotel also produces eatables from raw materials, such manufacturing or producing of goods that may be involved therein is only incidental or ancillary to the business of hotel running. There is no scope for separation of the integrated activity of the industrial undertaking and treating any part thereof as an activity of the nature referred to in section 32A. Therefore, this Court held that preparation of food in a hotel does not constitute manufacture or production of any article or thing within the meaning of section 32A and the assessee running the hotel is not entitled to investment allowance under the said section. The decision of this Court in Commissioner of Income Tax Vs. S.P. Jaiswal Estates (P.) Ltd.,

2. Having regard to the decision of this Court in the assessee's own case for the assessment year 1981-82, there would have been no difficulty in answering the first question in the affirmative and against the assessee, but on reading the statement of the case as sent by the Tribunal as well as the order of the Tribunal, it appears to us that the real controversy involved in this case in relation to the assessment year 1982-83 is not whether the assessee-company could be said to have been engaged in the manufacture of goods; but the controversy is whether the assessee could be said to be an industrial company or not for the purpose of determining the rate of taxes applicable to it under the relevant Finance Act, 1982. Therefore, it is necessary to reframe question No. 1 as under:

Whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that the assessee-company was not an industrial company?

3. At the hearing of this reference Mr. Poddar, the learned counsel appearing for the assessee, invited our attention to the definition of the expression "industrial company" as given in section 2(7)(c) of the Finance Act, 1982. It is common ground that the expression "Industrial company" is not defined in the Act and its definition is contained only in the relevant Finance Act, 1982. It would be convenient to set out the said definition of the expression "Industrial company" as contained in section 2(7)(c).

(c) "industrial company" means 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.

Explanation. - For the purposes of this clause, a company shall be deemed to be 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, if the income attributable to any one or more of the aforesaid activities included in its total income of the previous year (as computed before making any deduction under Chapter VI-A of the income tax Act) is not less than fifty-one per cent of such total income.

4. Mr. Poddar also drew our attention to Circular No. 103, dated 17-2-1973 see Taxmann's Direct Taxes Circular, Vol. 1, 1985 edn., p. 1393 issued by the CBDT explaining the meaning of industrial company under Explanation to section 2(7)(d) of the Finance Act, 1966. It was explained by Mr. Poddar that the expression "Industrial company" is defined each year by the relevant Finance Act and the definition as contained in the Finance Act, 1982 is on the same lines as contained in the Finance Act, 1966. The relevant circular is also set out here-in-below for the sake of convenience:

Meaning of industrial company under Explanation to section 2(7)(d):

1. Under sub-section (7)(d) of section 2 of the Finance Act 1966, an "industrial company" means 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 ship or in the manufacture or processing of goods or in mining. According to the Explanation to clause (d) of sub-section (7) of section 2, a company shall be deemed to be 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, if the income attributable to any of the aforesaid activities included in its total income for the previous year is not less than fifty-one per cent of such total income.

2. The question as to the exact meaning of the Explanation to sub-section (7)(d) of section 2, came up for the consideration and the Board are advised that an "industrial company" would mean-

(a) 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 of processing of goods or in mining, even if its income from such activities is less than 51 per cent of its total income; and

(b) a company which, even though not mainly so engaged, derives in any year 51 per cent or more of its total income from such activities.

Circular No. 103, dated 17-2-1973 see Taxmann's Direct Taxes Circular, Vol. 1, 1985 edn., p. 1393".

It was submitted by Mr. Poddar that the assessee-company in course of its hotel

business has to manufacture and process various types of eatables, like vegetable, meat, fish, spices and so on, for catering to the needs of the customers. The raw materials used in the process are clearly different and distinct from the finished product. The finished products like eatables, foods and drinks are even liable to sales tax as sale of goods. From the printed accounts of the assessee-company for the year under reference, Mr. Poddar, the learned counsel for the assessee drew our attention to the following figures.

Rs.

Restaurant receipts from food, beverages account Rs.

43,92,799

Less. Cost of food and beverages consumed

21,60,667

Earnings from restaurant

22,32,132

Net Profit as per profit and loss account

17,40,784

Assessed total income as per the assessment order

Rs. 22,52,840

It was submitted by Mr. Poddar that the total income as assessed by the ITO in respect of the assessment year 1982-83 now under reference vide his order dated 6-11-1984 passed u/s 143(3) of the Act was Rs. 22,52,840 which included earnings from restaurant to the extent of Rs. 22,32,132. In other words earnings from restaurant are more than the net profit as per profit and loss account and are also more than 51 per cent of the assessed total income of the assessee-company for the relevant previous year.

5. Our attention has been drawn to decision of this Court in Commissioner of Income Tax Vs. Sky Room Pvt. Ltd., where the judgment was delivered on 7-3-1989. In that case, the question was whether the assessee could be treated as an industrial company. The assessee in that case was engaged in business wholly in processing goods, rendering them edible and then selling them in its restaurants as foodstuff and eatables. In that case, it was held that the assessee was engaged in processing of goods and accordingly, the Court held that the Sky Room (P.) Ltd. was an industrial company within the meaning of section 2(7)(c) of the Finance Act, 1978. There the Court held that the word "processing" is broad enough to take in the activity of purchasing of goods and rendering them edible and selling them to its customers or the guests of the hotel as foodstuff and eatables.

6. Our attention has also been drawn to a decision of the Kerala High Court in Commissioner of Income Tax Vs. Casino (Pvt.) Ltd., where the Kerala High Court held that a hotel was mainly a trading concern. It would not be appropriate in the ordinary sense to refer to the production of the food material in a hotel as manufacture. This case was distinguished by this Court in Sky Room (P.) Ltd. (supra), where the Court observed that, before the Kerala High Court, the categorical finding was that hotel activity was the main activity and, accordingly, it was not engaged mainly in the activity of manufacture or production of goods. The ratio of that judgment was quite different and was given in a different context of facts. Accordingly, it was not necessary for this Court in Sky Room (P.) Ltd.'s case (supra) to follow the decision of the Kerala High Court in Casino (P.) Ltd.'s case (supra). On the other hand, this Court relied on an earlier decision of this Court in G.A. Renderian Ltd. Vs. Commissioner of Income Tax, . In that case, the assessee, who carried on the business of purchasing tea of different qualities and blending the same by mixing one type with another, claimed that it was an industrial company within the meaning of section 2(7)(c) of the Finance Act, 1978, and was entitled to concessional rate of tax. This Court held that the assessee was an industrial company entitled to this benefit. There, this Court considered in detail the meaning of the word "processing".

7. There, this Court followed the decision of the Supreme Court in the case of Chowgule and Co. Pvt. Ltd. and Another Vs. Union of India (UOI) and Others, The question involved before the Supreme Court was whether blending of ore of different qualities for obtaining ore of requisite specification amounted to processing within the contemplation of the Central Sales Tax Act. The Supreme Court observed that though the blending of different qualities of ore possessing differing chemical and physical composition so as to produce ore of the contractual specification could not be said to involve the process of manufacture since the ore that was produced could not be regarded as a commercially new and distinct commodity from the ore of different specifications blended together, the operation of blending would amount to "processing" of ore within the meaning of section 8(3)(b) and rule 13. This Court, after considering the aforesaid Supreme Court decision and other decisions on this point, held that the word "processing" used in the definition of "industrial company" in section 2(7)(c) of the Finance Act, 1978, has not been defined in the Act, and it must, therefore, be interpreted according to its own natural meaning. Webster's Dictionary gives the following meaning of the word "process" to subject to some special process or treatment, to subject (especially raw material) to a process of manufacture, development or preparation for the market, etc., to convert into marketable form as livestock by slaughtering, grain by milling, cotton by spinning, milk by pasteurizing, fruits and vegetables by sorting and repacking. Where, therefore, any commodity is subjected to a process or treatment with a view to its "development or preparation for the market", as, for example, by sorting and repacking fruits and vegetables, it would amount to processing of the commodity.

8. The nature and extent of processing may vary from case to case; in one case, the processing may be slight and, in another, it may be extensive; but with each process suffered, the commodity would experience a change. Wherever a commodity undergoes a change as a result of some operation performed on it or in regard to it, such operation would amount to processing of the commodity. The nature and extent of the change is not material. The question is not whether there is manual application of energy or there is application of mechanical force. Whatever be the means employed for the purpose of carrying out the operation, it is the effect of the operation on the commodity that is material for the purpose of determining whether the operation constitutes "processing".

9. Mr. Poddar also referred to the decision at the Delhi High Court in *Nu-look (P.) Ltd. Vs. Commissioner of Income Tax, Delhi*, There the assessee-company made readymade garments and also carried out tailoring of clothes for customers. The making of clothes or garments according to the order of customers was held to be a case of manufacturing or processing of goods. Mr. Poddar finally submitted that having regard to the principles laid down in the aforesaid cases and more particularly in the light of the decision of this Court in *Sky Room (P.) Ltd.*'s case (supra) as well as the Board's Circular referred to hereinabove, the assessee-company must be held to be an industrial company within the meaning of section 2(7)(c) of the Finance Act, 1982 and should, accordingly, be held to be chargeable to tax at the concessional rate of 60 per cent rather than 65 per cent levied by the ITO.

10. As already stated earlier, the controversy involved in this reference is clearly different from the one which was considered by this Court in the case of the assessee itself in relation to the assessment year 1981-82, the judgment whereof is in *S.P. Jaiswal Estates (P.) Ltd.*'s case (supra). In order to claim investment allowance u/s 32A, the assessee must own an industrial undertaking and the relevant machinery or plant should be installed and used for the purposes of business of construction, manufacture or production of any article or thing. The activity of processing is not referred to in sub-section (2) of section 32A but the definition of industrial undertaking as contained in section 2(7)(c) of the Finance Act, 1982 specifically provides that a company will be an industrial company even when it is engaged in the processing of goods. There can be no doubt that in the process of manufacturing eatables, food and drinks, the assessee-company does carry out a processing activity through different raw-materials like vegetables, meat, fish, spices and so on for catering to the needs of the customers. The income from such activity is clearly seen to be more than 51 per cent of the total income as assessed by the ITO for the assessment year under reference. Although this criterion is not relevant in the light of Circular No. 103, dated 17-2-1983 issued by the CBDT, the CBDT has clarified that even if the income from the activity of manufacture or processing of goods is less than 51 per cent of its total income, the company may be said to be one which is mainly engaged in the business of manufacture or processing of goods. The CBDT has, therefore, stated that a company which even though not mainly so engaged,

derives in any year 51 per cent or more of its total income from such activities like manufacture or processing of goods, it can be held to be an industrial company.

11. This very issue was considered by this Court in Sky Room (P.) Ltd."s. case (supra). There this Court distinguishing the decision of the Kerala High Court in Casino (P.) Ltd."s case (supra) held that the activity carried out in a restaurant was nothing but manufacture or processing of goods and the assessee-company running a restaurant in that case was held to be an industrial company within the meaning of section 2(7)(c) of the Finance Act, 1978. There the Court held that the word "processing" was broad enough to take in the activity of processing of goods and rendering the eatables fit for selling them to its customers.

12. We are of the view that the assessee is an industrial company within the meaning of section 2(7)(c) of the Finance Act, 1982 and is, accordingly, chargeable to concessional rate of income tax. In that view of the matter we answer the reframed question No. 1 as well as question No. 2 as referred to by the Tribunal in the negative and in favour of the assessee. There will be no order as to costs.

Shyamal Kumar Sen, J.

I agree.