(1981) 07 P&H CK 0006

High Court Of Punjab And Haryana At Chandigarh

Case No: Income-tax Reference No''s. 92 to 94 of 1976 and Income Tax Case No. 21 of 1977

Ambala Cantt. Electric Supply Corporation Ltd.	APPELLANT
Vs	
Commissioner of Income Tax	RESPONDENT

Date of Decision: July 27, 1981

Acts Referred:

- Electricity Act, 1910 - Section 6(1) , 7A(4)
- Income Tax Act, 1961 - Section 256, 256(1), 28, 37, 48
- Industrial Disputes Act, 1947 - Section 25F, 25FF

Citation: (1981) 25 CTR 361 : (1982) 133 ITR 343

Hon'ble Judges: M.M. Punchhi, J; Kulwant Singh Tiwana, J

Bench: Division Bench

Advocate: B.S. Gupta, for the Appellant; D.N. Awasthy and B.K. Jhingan, for the Respondent

Judgement

K.S. Tiwana, J.

The facts necessitating these references, to this court are that the Ambala Electric Supply Corporation Ltd., Ambala Cantt. (hereinafter referred to as " the assessee "), had been carrying on the business of electric supply under the licence issued under the Indian Electricity Act, 1910 (hereinafter referred to as the " 1910 Act "). The licence issued on 4th of July, 1932, was for 30 years and the supply of the electricity was commenced on 24th of April, 1935. u/s 6(1)(a) of the 1910 Act, the Punjab State Elecricity Board, which was succeeded by the Haryana State Electricity Board on the bifurcation of the State of Punjab on 1st of November, 1966, exercised the option to purchase the said industrial undertaking together with the land, building, plant, machinery, etc., by virtue of the provisions of the 1910 Act. On the option of purchase being exercised by the Board, it (the undertaking) stood vested in it (the Board). The industrial undertaking was transferred from the assessee to the Punjab

State Electricity Board on the midnight of 23rd and 24th of April, 1965. The assets of the assessee-company were tentatively valued at Rs. 21,74,333. The assessee was not satisfied with the valuation and the matter was ultimately referred to arbitration. The relevant previous year ended on 31st of March, 1966. During that year the assessee was paid Rs. 9,50,000 on account of the transfer of the industrial undertaking. The assessee, though no longer doing the business of electric supply, continued to maintain an establishment and incurred an expenditure on account of salary of the managing director, telephone, travelling allowances, etc. During that period; the assessee returned a loss of Rs. 1,52,120. The ITO framed the assessment and assessed the assessee to a total income of Rs. 11,50,250.

2. The main points of controversy, which are before us, besides others, as referred below, arose between the assessee and the revenue. The first point is regarding Rs. 75,317, which the assessee expended during the financial years 1966-67, 1967-68 and 1968-69 on the maintenance of the staff, etc. The ITO rejected the claim of the assessee on the ground that this expenditure was not incurred by it during the year under consideration, that is, the financial year 1965-66. On appeal by the assessee, the AAC set aside the decision of the ITO on this question and deleted the addition of this amount. On appeal by the revenue, the Income Tax Appellate Tribunal (hereinafter referred to as " the Tribunal") affirmed the decision of the AAC in this regard.

3. The second point of controversy between the parties is about the sum of Rs. 1,36,000. This amount was paid by the assessee as retrenchment compensation to its workmen u/s 25FF of the Industrial Disputes Act, 1947. The ITO disallowed this amount. In the appeal filed by the assessee, the AAC reversed the order of the ITO. On further appeal by the revenue, the members of the Tribunal expressed divergent views. One member agreed with the AAC to uphold his order while the other expressed an opinion for its reversal. On this difference of opinion, the matter was referred to Mr. S. Ranganathan, a third member. Mr. S. Ranganathan disagreed with the AAC and, by a majority, this order of the AAC was set aside and that of the ITO was restored.

4. The third point relates to the item of Rs. 3,62,390 received by the assessee as consideration for the sale. The ITO repelled the contention of the assessee to treat this as a solatium. The assessee lost the case about this item of money up to the Tribunal.

5. On the request of the revenue as well as the assessee, the Tribunal u/s 256(1) of the Act framed the following two questions and have referred those 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 expenses of Rs. 75,317 incurred by the assessee on the maintenance of the staff and establishment are expenses as contemplated by Section 48(i) of the Income Tax Act, 1961, and consequently allowable ?

(2) Whether the sum of Rs. 1,36,000 representing retrenchment compensation has been rightly held by the Tribunal to be not allowable deduction either u/s 28 or u/s 37 of the Income Tax Act, 1961?"

6. Regarding the amount of Rs. 3,62,390, the assessee formulated the following question and wan''ted its reference to this court u/s 256(1) of the Act:

" Whether, on the facts and in the circumstances of the case and in accordance with the provisions of law, the Tribunal was justified in holding that a sum of Rs. 3,62,390 received by virtue of the proviso to Section 7A(4), the Indian Electricity Act, by the assessee is not a capital receipt and forms part of the sale price ? "

7. The Tribunal did not agree with the assessee on this point and refused its prayer. The assessee filed Income Tax Case No. 21 of 1977--Ambala Cantt. Electric Supply Corporation Ltd. v. CIT with a prayer that the Tribunal be directed to refer the question to this court for a decision.

8. This is how these References Nos. 92 to 94 of 1976 and Income Tax Case No. 21 of 1977 are before us. As all these references and the Income Tax Case No. 21 of 1977 arise out of the same case between the parties, they shall be decided together.

9. Rs. 75,317 are claimed by the assessee as expenses of the staff, which he had to retain;''to see the transfer through and also- to finalise the compensation regarding the assets of the assessee in the industrial undertaking transferred to the Haryana State Electricity Board. Although the management of the undertaking had passed hands on the midnight of the 23rd and 24th of April, 1965, that was not a final thing for the assessee. The assets of the undertaking had to be assessed and valued for the purpose of the fixation of the fair price. Payment of compensation was a necessary part of the transfer of the undertaking and the maintenance of the staff was necessary to safeguard the interests of the assessee. It is an admitted position in the case that the matter of compensation could not be settled amicably and had to be referred to arbitration. This shows that the assessee and the Haryana State Electricity Board disagreed on the fixation of the fair price. In order to have the maximum price on account of the transfer of the undertaking the assessee had to maintain the necessary staff. Compensation as an incident of the transfer was to be received by the assessee and the expenditure so incurred on the staff was in connection with it for pursuing the matters with the concerned authorities, including arbitration. These expenses, which the assessee had to incur, are covered u/s 48(i) of the Act and the case of the assessee was rightly accepted by the Tribunal. We do not find any infirmity in the judgment of the Tribunal on question No. 1 and answer it against the revenue.

10. Mr. B. S. Gupta, learned counsel for the assessee, before dealing with the m''atter covered by question No. 2, urged that this question as framed is for its consideration under Sections 28 and 37 of the Act. According to Mr. Gupta, Section 48 of the Act is also attracted for application to it. He has requested this court for a

refraining of the question in order to include Section 48 in this question along with Sections 28 and 37. Mr. D. N. Awasthy, learned counsel, appearing on behalf of the revenue, has objected to it on the ground that nowhere before the I.T. authorities, including the Tribunal, Section 48 of the Act was even remotely referred by the assessee. According to Mr. Awasthy, the assessee never tried to take the benefit of Section 48 and it is for the first time that it has urged this point before this court, which has only an advisory jurisdiction and thus it cannot ask for a refraining of the question as suggested on its behalf by Mr. Gupta. According to Mr. Awasthy, this will not be a simple refraining of the question but making out an altogether new one. Mr. Awasthy has further stated that this court has to decide the question as it has been framed by the Tribunal at the instance of the assqssee.

11. We have gone through the orders passed by the ITO, the AAC and the Tribunal and find that before these authorities the assessee had not referred to Section 48 of the Act even remotely. .Since the question of the attraction of Section 48 of the Act was not raised before the I.T. authorities, they never had the occasion to consider it. The Tribunal, while hearing the appeal under the Act, no doubt, has wide powers. It was not afforded an occasion to consider the impact of Section 48 of the Act on the case. The form of the application to be submitted to the Tribunal for referring the question to the High Court is prescribed by the Act. . Section 48 was not invoked for inclusion in that application. It has been raised for the first time on behalf of the assessee before this court. It cannot be said that the assessee or the persons appearing on its behalf to argue its case before the I.T. authorities were not cognizant of the provisions of Section 48. For the first question they have reclined against Section 48 of the Act for help. It was thus a case of deliberate omission in regard to the utilization of Section 48 of the Act in regard to the sum of Rs. 1,36,000 as is covered by question No. 2.

12. The jurisdiction of the High Court in a reference u/s 256(1) of the Act is a special one. It is different from its ordinary jurisdiction as a civil court. The High Court hearing a reference under this provision does not exercise any appellate, revisional or supervisory jurisdiction. It acts purely in its advisory capacity on a reference which brings the case before it u/s 256(1) of the Act. It gives advice to the Tribunal, which, ultimately, has to give effect to that advice. It is of the essence of such a jurisdiction that this court can decide only questions which are referred to it and not any other question. In Commissioner of Income Tax, Bombay Vs. Scindia Steam Navigation Co. Ltd., , this matter was considered by the Supreme Court and the matter was divided into four parts for consideration (p. 611):

" The result of the above discussion may thus bo summed up :

(1) When a question is raised before the Tribunal and is dealt with by it, it is clearly one arising out of its order.

(2) When a question of law is raised before the Tribunal but the Tribunal fails to deal with it, it must be deemed to have been dealt with by it, and is, therefore, one arising out of its order.

(3) When a question is not raised before the Tribunal but the Tribunal deals with it, that will also be a question arising out of its order.

(4) When a question of law is neither raised before the Tribunal nor considered by it, it will not be a question arising out of its order notwithstanding that it may arise on the findings given by it.

Stating the position compendiously, it is only a question that has been raised before or decided by the Tribunal that could be held to arise out of its order. "

13. The Supreme Court again in Commissioner of Gift Tax, Bombay Vs. Smt. Kusumben D. Mahadevia, , considered the position and following Commissioner of Income Tax, Bombay Vs. Scindia Steam Navigation Co. Ltd., , observed (p. 48):

" Now, it is difficult to see how the question whether the valuation of the shares should, have been made on the basis of the break-up method by reason of r. 10, sub-r. (2), of the G.T. Rules, can be required to be referred by the Tribunal to the High Court. It is well settled that no question can be referred to the High Court unless it arises out of the order of the Tribunal and, as pointed out by this court in Commissioner of Income Tax, Bombay Vs. Scindia Steam Navigation Co. Ltd., , a question of law can be said to arise out of the order of the Tribunal only if it is dealt with by the Tribunal or is raised before though not decided by the Tribunal and a question of law not raised before the Tribunal and not dealt with by it in its order cannot be said to arise out of its order, even if on the facts of the case stated in the order the question fairly arises. "

14. In this case, the Supreme Court did not permit the raising of the question, which was not raised before the Tribunal.

15. The question now raised by Mr. B. S. Gupta falls under category 4 of the observations of the Supreme Court, quoted above from Commissioner of Income Tax, Bombay Vs. Scindia Steam Navigation Co. Ltd., , as it was not raised before the I.T. authorities or the Tribunal, nor was it considered by them. The mere fact that from the facts of a case by the application of Section 48 of the Act relief could be claimed by the assessee, it does not enable this court to recast the question to suit the interest of the assessee. This court, acting in a limited jurisdiction of advisory nature, cannot step beyond the limits of the questions referred to it by the Tribunal to reframe or recast the question by adding in it that ground which was not raised before the Tribunal. We do not find it to be a fit case for consideration even for referring the case back to the Tribunal to re-submit a question after framing it.

16. Reverting to question No. 2, after declining the prayer of Mr. Gupta, we find that it is a common case of the parties that the assessee acting u/s 25FF of the Industrial

Disputes Act issued notices to the workmen working in the industrial undertaking, which was transferred in accordance with Section 25FF of the same Act, determining their services, coinciding it with the date of transfer of the undertaking in favour of the Punjab State Electricity Board. The retrenchment compensation, which amounts to Rs. 1,36,000, is being claimed as an allowable expenditure u/s 28 or Section 37 of the Act. The manner in which it was decided by the ITO, the AAC and the Tribunal has been noticed in the earlier part of the judgment. The majority view of the Tribunal to reach a decision against the assessee drew support from Commissioner of Income Tax, Kerala Vs. Gemini Cashew Sales Corporation, Quilon, . Mr. B. S. Gupta, learned counsel for the assessee, has argued that the Gemini Cashew Sales Corporation''s case is distinguishable and is not attracted for application to the facts of the case, as the facts of that case did not fall within the purview of Section 25FF of the Industrial Disputes Act. According to Mr. Gupta, so long as the undertaking was not transferred, the assessee could, when its''transfer became definite, being settled in advance, take advantage of the provisions of the Industrial Disputes Act by issuing notices for retrenchment to the workmen of the undertaking to meet the liability which was a legal one, under the Industrial Disputes Act. The argument of Mr. D. N. Awasthy on the other hand mainly based on the Commissioner of Income Tax, Kerala Vs. Gemini Cashew Sales Corporation, Quilon, and Modi Electric Supply Co. Vs. Commissioner of Income Tax, , is that before the actual transfer no right to retrenchment compensation had accrued to the workmen, being a right based on a contingency, and the assessee could not issue any notice to maximise his expenses. The liability, according to Mr. Awasthy, of compensation accrued only on the transfer of the undertaking and as such the amount so expended was not an allowable deduction under any provision of the Act.

17. In order to appreciate the rival contentions and points involved in the case, a reference to Sections 25F and 25FF of the Industrial Disputes Act has become unavoidable. These run as under :

" 25F. No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-

(a) the workman has been given one month''s notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice :

Provided that no such notice shall be necessary if the retrenchment is under an agreement which specifies a date for the termination of service.

(b) the workman has been paid, at the time of retrenchment, compensation which shall be equivalent to fifteen days'' average pay for every completed year of continuous service or any part thereof in excess of six months; and

(c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette.

25FF. Where the ownership or management of an undertaking is transferred, whether by agreement or by operation of law, from the employer in relation to that undertaking to a new employer, every workman who has been in continuous service for not less than one year in that undertaking immediately before such transfer shall be entitled to notice and compensation in accordance with the provisions of Section 25F, as if the workman had been retrenched :

Provided that nothing in this section shall apply to a workman in any case where there has been a change of employers by reason of the transfer, if-

(a) the Service of the workman has .not been interrupted by such transfer;

(b) the terms and conditions of service applicable to the workman after such transfer are not in any way less favourable to the workman than those applicable to him immediately before the transfer ; and

(c) the new employer is, under the terms of such transfer or otherwise, legally liable to pay to the workman, in--the event of his retrenchment, compensation on the basis that his service has been continuous and has not been interrupted by the transfer." ,

18. Mr. Awasthy stated that the transfer of the undertaking did not include workmen and there was no obligation on the Haryana State Electricity Board to absorb them. Mr. Awasthy is correct in this assertion as there is no provision in the 1910 Act for the taking over of the workman by the transferee. It is again not disputed by the revenue that the workmen working in the industrial undertaking were not taken over by the State Electricity Board after its transfer. The services of the workmen, working in the undertaking, under the assessee before its transfer, were interrupted as they were not taken over by the State Electricity Board. The affected parties can assess the results which flow from the impact of a statute. The interruption of the service of the workman immediately on transfer may have been known to the assesses even prior to the actual transfer of the undertaking. Proviso to Section 25FF of the Industrial Disputes Act thus does not apply to the case because of the interruption of the service of the workmen. By the fiction created by Section 25FF of the Industrial Disputes Act, the termination of the services of the workmen because of the transfer fell within the ambit of the definition of " retrenchment" as given in Section 2(oo) of the Industrial Disputes Act.

19. The words in Section 25FF " immediately before such transfer " have been suggested by Mr. Awasthy to mean a little before the actual transfer of the industrial undertaking. In his view these words do not postulate any prior time much less a period of one month or more. When a notice is to be issued in accordance with the

provisions of Section 25F of the Industrial Disputes Act, it cannot be any notice short of one month. If one month''s notice is to be given at the actual time of transfer or a few minutes or a few hours before that, then, in our view, it will be only an exercise in futility. It will lead to the swelling of the expenses of the transferor adding to his loss on the transfer of the undertaking. Section 25FF is a provision incorporated for the mutual benefit of the employers and the workmen. If the termination of the workmen had come about by the actual transfer, there being no obligation for the transferee to absorb them, the retrenchment compensation becomes payable because of such termination and it had to be paid by the transferor, that is the assessee, because of the provisions of Section 25FF. If the assessee had paid cash retrenchment compensation to the workmen at 11.55 p.m. on 23rd of April, 1965, being certain of the transfer of the industrial undertaking, then, considering the words " immediately before such transfer ", in the way suggested by Mr. Awasthy, it would have been all right and it could claim it as an allowable deduction as it was in the course of its business. If that can be so why cannot the assessee take the other recourse provided by law in the same provision, that is, giving one month''s notice for retrenchment when he is equally certain of the time and date of transfer, which is by operation of law ?

20. Although the reference to the history and object of the introduction of Sections 25F and 25FF in the Industrial Disputes Act need not be gene into, a brief reference to it seems unavoidable at this stage. The rights created by Section 25F are based on humane public policy as a safety against involuntary unemployment, which may cause dislocation to trade and industry and economic insecurity. The object of Section 25F of the Industrial Disputes Act was that an employer could relieve himself of the economic dead weight of surplus labour and at the same time the employee should not be thrown on the road for no fault of his. While giving option in given cases to the employer to shake off such economic dead weight it assured the employee and his family of some partial protection to tide over the hard period of unemployment. Section 25FF was introduced to safeguard the rights of workmen, who because of the transfer of an undertaking could not be employed by the transferee.

21. Section 25F of the Industrial Disputes Act prescribes that in all cases of transfer by agreement or by the operation of law which do not fall under the proviso, on a transfer of the ownership or management of an industrial undertaking, a workman, who has been in continuous service of not less than one year in that undertaking immediately before the transfer, shall be entitled to notice and compensation in accordance with the provisions of Section 25F. This is because the section equates such a termination of service with retrenchment as defined in Section 2(oo) of this Act. It matters little who initiates the proceedings towards the termination. If the employer, who has a prior notice of the date and time of the transfer of the industrial undertaking, which is definitely fixed, takes steps to issue retrenchment notice in accordance with law governing the industrial relations resulting in the

creating of a liability regarding which deductions can be claimed under the I.T. Act, then it can reap the benefit of that. The transferor of the undertaking, when the control of management still vests in it, can create that liability, which, though based on legal fiction, is real and effective and can take steps to minimise his losses by issuing retrenchment notices as provided by Section 25FF of the Industrial Disputes Act. The language for the principal clause of Section 25FF makes it clear that if the right of the retrenchment compensation accrues to the workman, then it must be a right to receive compensation from the employer, who was its" (undertaking''s) owner uptil the date and time of transfer. The only thing to be guarded against is that the retrenchment should not be by way of punishment, but in anticipation of a transfer.

22. In view of this matter, we are of the opinion that Section 25FF of the Industrial Disputes Act, which governs the industry gives a right to the transferor to take a pre-emptive action to minimise his expenses by giving an advance retrenchment notice to the workmen synchronising with the time of the transfer.

23. The foundations of the arguments addressed on behalf of the revenue, as noticed earlier, are based on Commissioner of Income Tax, Kerala Vs. Gemini Cashew Sales Corporation, Quilon, . In that case, the facts were : "Two persons, Walter and Ramasubramony, carried on business in cashewnuts as partners in the name and style of Messrs. Gemini Cashew Sales Corporation. The partnership was dissolved on the death of Ramasubramony on August 24, 1957, and the business was taken over and continued by Walter on his own account. The services of the employees were not interrupted and there was no alteration in the terms of employment of the employees of the establishment." In Commissioner of Income Tax, Kerala Vs. Gemini Cashew Sales Corporation, Quilon, because of the provisions of Section 25FF no right to the workmen accrued to receive retrenchment compensation. It was observed by the Supreme Court in that case (p. 647):

" In the view we take, that the allowance claimed is not a proper outgoing, or allowance in computing the profits of the assessee, we do not express any opinion on the question whether the workmen of the undertaking became entitled to retrenchment compensation on the transfer of the undertaking to Walter. "

24. The Supreme Court did not in that case advert to decide the question of entitlement of the workmen to receive compensation. The facts of Gemini''s case were not similar to the one in hand. In this case, because of known certainty of the non-absorption of the workmen by the transferee of the undertaking, that is, the Haryana State Electricity Board, the workmen had become entitled to receive retrenchment compensation. It was further observed in Gemini''s case (p. 647):

" Liability to pay retrenchment compensation arises u/s 25FF when there is a transfer of the ownership or management of an undertaking : it arises on the transfer of the undertaking and not before. Transfer of ownership or management

of an undertaking in law operates except in the conditions set out in the proviso, as retrenchment of the workmen. But until there is a transfer of the undertaking resulting in determination of employment, the workmen do not become entitled to retrenchment compensation. So long as the ownership of the business continues with the employer, the right of the workmen to claim compensation remains contingent. A workman may, before the transfer of ownership of the business, himself terminate the employment: he may die or he may become superannuated; in none of these cases the owner of the business is under any obligation to pay retrenchment compensation to the workman. The obligation to pay compensation becomes definite only when there is retrenchment by the employer, or when the ownership or management of the undertaking is, except in the cases contemplated by the proviso, transferred to a new employer, and not till then.The right, therefore, arises from determination of employment, or from transfer of the undertaking: it has no existence before these events take place."

25. The question posed by the Supreme Court for answer in Commissioner of Income Tax, Kerala Vs. Gemini Cashew Sales Corporation, Quilon, was noted at p. 649 :

"The question that falls to be determined is whether the liability which arises on transfer of the business is to be regarded as a permissible outgoing in the account of the business which is transferred."

26. The question quoted above was decided by the Supreme Court on the facts of that case without expressing any opinion whether the workmen had become entitled to retrenchment compensation on the transfer of the undertaking to Walter. The case was covered by the proviso to Section 25FF. The facts of Commissioner of Income Tax, Kerala Vs. Gemini Cashew Sales Corporation, Quilon, are different from the facts of the case in hand. The transfer of the undertaking due to the sudden death of Ramasubramony was unforeseen and the services of the workmen were not interrupted and also there was no alteration in the terms of the employment. In Gemini''s case, the awareness of the liability came after the death of Ramasubramony. In the case in hand, by the operation of law, that is the 1910 Act, the transfer of the industrial undertaking had become definite and certain and a date had been fixed for the transfer. The management of the assessee as well as the workmen were cognizant of the certainty of the fateful event, that is, the transfer. They were also cognizant of the absence of the obligation on the part of the transferee because of the provisions of 1910 Act not to absorb the services of the workmen. The transfer being a certainty, the right of the workmen to receive compensation could not be said to remain contingent any longer. The employer in such a case, can determine the services of the workmen through a notice. Similar intention is also reflected from the observations in Commissioner of Income Tax, Kerala Vs. Gemini Cashew Sales Corporation, Quilon,

" The obligation to pay compensation becomes definite only when there is retrenchment by the employer, or when the ownership or management of the undertaking is, except in the cases contemplated by the proviso; transferred to a new employer and not till then. The right, therefore, arises from determination of employment, or from transfer of the undertaking : it has no existence before these events take place. "

27. After considering the facts and the observations of the Supreme Court in Commissioner of Income Tax, Kerala Vs. Gemini Cashew Sales Corporation, Quilon, , in detail, we feel that the, facts on which the judgment came to be delivered were different. The liability arose suddenly because of the unforeseen event, that is, the death of Ramasubramony and the liability had arisen, after the transfer of the undertaking in favour of Walter. In that case, no right had arisen to the workmen to receive retrenchment compensation while in the case in hand, on the basis of the facts noticed in the earlier part of the judgment, the termination of the workmen no longer had remained, contingent, but, become definite and the assessee had invoked the provisions of the Industrial Disputes Act, which had been enacted through amendments as beneficial provisions after noticing the impact of certain judgments of the Supreme Court. Mr. Awasthy, in our view, cannot draw any support from this case and the majority of the members of the Tribunal, in our view, were not correct to interpret this judgment in the way in which they have done.

28. The other case on which Mr. Awasthy has very heavily reclined is the judgment of this court in Modi Electric Supply Co. Vs. Commissioner of Income Tax, . The facts in Modi Electric Supply Company''s case, to some extent, were similar to the one in hand. That company also worked under a licence issued under the 1910 Act, which had expired on the midnight of 7th and 8th of June, 1963. On that date, the industrial undertaking was taken over by the Punjab State Electricity Board. The Modi Electric Supply Company issued notices to its workmen u/s 25FFF of the Industrial Disputes Act, in accordance with Section 25F of the same Act. It claimed Rs. 39,341, which it had paid to its workmen as retrenchment compensation as an allowable deduction. The Tribunal, at the instance of the Modi Electric Supply Co., referred the following question to this court:

" Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the sum of Rs. 39,341 representing retrenchment compensation was not an allowable deduction either u/s 28(i) or u/s 37 of the Income Tax Act, 1961 ? "

29. In that case, it was observed (p. 406) :

" What reasons prompt an employer to retrench all or any of its employees are very much germane to the exercise of that power both in the context of the Industrial Disputes Act, as also in the context of the provisions of Section 41(2) of the I.T. Act. The reason in both cases is to be one which is dictated by the business interest, i. e., it is the desire not to carry on the business that has to prompt the employer to take

the drastic step of retrenching any or all of its employees. Where such is not the case, the employer, may not succeed in retrenching any of its employees. If that would be the case there would be no question of payment of retrenchment compensation and consequently of deduction of that amount u/s 41(2) of the I.T, Act. Surely, retrenchment of all the employees of a concern cannot be for the reason of carrying on of the business. The reason for taking such a step would be the closure of the business. That being the case, any expenditure incurred by the assessee-company by way of retrenchment compensation would not be an expenditure laid out for the purpose of the business. Any expenditure by way of retrenchment compensation on account of the closure of the business would be an expenditure envisaged by Section 25FFF of the Industrial Disputes Act, the payment whereof is concurrent with the closure of the business, and the same cannot be considered a payment during the course of business. "

30. I was a party to the judgment in Modi Electric Supply Co. Vs. Commissioner of Income Tax, and had the impression that this company had taken the plea before the I.T. authorities that it was a case of closure of business u/s 25FFF. I got the paper book of Modi Electric Supply Company''s case--I.T.R. No. 11 of 1974--put up. In the order of the Tribunal at p. 27 of the paper book, the observations appear as:

" It also contended that the retrenchment compensation u/s 25FFF of the Industrial Disputes Act, 1947, was a revenue expense, the same having been incurred during the course of carrying on of the business. The company filed a letter dated 3rd of September, 1966, where it submitted as under :

''3. Re : Retrenchment compensation :

Liability of the company in respect of retrenchment compensation accrued under the Industrial Disputes Act, 1947. Our electricity undertaking was closed down on 7th June, 1963, consequent upon the expiry of our electric supply licence. We did not transfer the services of any employee of the undertaking to the Punjab State Electricity Board who took over the undertaking. We had given notice of retrenchment u/s 25F of the Industrial Disputes Act to each and every employee of the company.

31. Again at p. 29 of the paper book, from the order of the Tribunal, it is to be found:

" As far as the claim for retrenchment compensation was concerned, it was pleaded by the assessee-company that the services of the employees had been terminated because of the notice of the company dated May 6, 1968, and the compensation was payable u/s 25FF of the Industrial Disputes Act, 1947. "

32. It is thus clear from the records of this case (Modi Electric Supply Co.) that it had taken the plea of Section 25FFF, which deals with the closure of the business of the industrial undertaking and not Section 25FF. Section 25FF of the Indusrial Disputes Act specifically deals with the transfer of the industrial undertaking. Closure of the

undertaking and transfer of the undertaking are two different things. In the case of closure, the business ceases to run and in the case of transfer, it continues in the hands of the transferee. The Supreme Court in Workmen of Uttar Pradesh State Electricity Board v. Upper Ganges Valley Electricity Supply Company [1966] LLJ 730 , ruled that the taking over of the Upper Ganges Valley Electricity Supply Company by the Uttar Pradesh State Electricity Board on the expiry of the licence did not entail the closure of the undertaking as the undertaking never closed down. In Modi Electric Supply Co. Vs. Commissioner of Income Tax, , the case set up was of closure of the undertaking u/s 25FFF of the Industrial Disputes Act while in the case in hand it its Section 25FF of the Industrial Disputes Act, which is being taken advantage of. It was on these premises that in Modi Electric Supply Co. Vs. Commissioner of Income Tax, , these observations were made:

" Any expen diture by way of retrenchment compensation on account of the closure of the business would be an expenditure envisaged by Section 25FFF of the Industrial Disputes Act, the payment whereof is concurrent with the closure of the business, and the same cannot be considered a payment during the course of business ."

33. These observations are the governing theme of the judgment. The inference drawn by the Bench in Modi Electric Supply Company''s case was based on these premises and it was decided on the basis of Section 25FFF, that is, closure of business. It is manifest from the extensive reproduction from the paper book of the Modi Electric Supply Co. Vs. Commissioner of Income Tax, , that the case was decided on a different footing, on the basis of different pleas raised in a different context. The case being distinguishable on the pleas raised cannot be advantageously relied upon by Mr. Awasthy as a precedent for this Bench.

34. Mr. Awasthy argued that as long as the owner of the industrial undertaking or the business has the furtherance of business in view, he can spend the amount, but when he sees the dead end of his business, the expenditure incurred, as in this case, no longer remains'' revenue expenditure but becomes capital expenditure. " Purpose of the business ", as this term is used in Section 37 of the Act, has a wide import. The purpose of business is to be assigned a meaning according to the circumstances of each case and this is not capable of being assigned a limited meaning. At least one thing, to our mind, is certain in this context, that the things done to cut down the losses, when the business is still running are for the purpose of the business. The provisions of Section 25F and 25FF of the Industrial Disputes Act, which are for the mutual benefit of the employer and the workmen, are to be liberally construed. These provisions give a right to the employer to take steps to avert the loss even if the steps result in the maximising of the expenses. If such a step u/s 25FF of the Industrial Disputes Act is taken, as in this case, during the continuation of the business but before the actual transfer, when the assessee is still the owner of the industrial undertaking, under the operation of law, then the

amount expended by way of retrenchment compensation will be covered by Section 37 of the Act. It cannot be disputed that the assessee has a right to minimise the incidence of the tax by legitimate means. The steps taken by the assessee in this case in anticipation of the transfer, the date of which was definite, can at the most be said to achieve''these objects. The Industrial Disputes Act gives him this right in the wake of the transfer of his undertaking by operation of law. In determining the services of the workmen by issuing termination notices under the provisions of the Industrial Disputes Act, the assessee created a liability, which, in a legitinate way, is recognised by law. He can claim its exclusion from his taxable income as an outgoing and is covered by 37 of the Act. This question is accordingly answered in favour of the assessee.

35. The last item of Rs. 3,62,390 covered by Income Tax Case No. 21 of 1977 is covered by the judgment in The Fazilka Electric Supply Co. Ltd. Vs. The Commissioner of Income Tax, Delhi, . It was rightly decided by the Tribunal and no reference was required to be made for mis item.

36. For the foregoing reasons, the references are accordingly answered. No order as to costs.