(1980) 01 KL CK 0024

High Court Of Kerala

Case No: IT Reference No''s. 160 and 161 of 1977

Commissioner of Income Tax		APPELLANT
	Vs	
Malayalam Plantations Ltd.		RESPONDENT

Date of Decision: Jan. 3, 1980

Acts Referred:

- Income Tax Act, 1961 - Section 155(5), 33, 34(3)

Citation: (1980) 3 TAXMAN 421

Hon'ble Judges: V.P. Gopalan Nambiyar, C.J; G. Balagangadharan Nair, J

Bench: Division Bench

Advocate: P.K. Ravindranatha Menon, for the Appellant; P.K. Kurien, K.A. Nayar and P. Balachandran, for the Respondent

Judgement

V.P. Gopalan Nambiyar, C.J.
At the instance of the revenue, the Appellate Tribunal, Cochin Bench, has referred the following question of law for our determination:

Whether, on the facts and in the circumstances of the case, the Appellate Tribunal is correct in law in holding that the income tax Officer is not justified in withdrawing the development rebate granted to the assessee?

The assessee, Malayalam Plantations Ltd., Cochin, is a limited company owning a number of estates in Kerala. The company is registered in London and the shareholders and the board of directors are in London. That is why it is known as the Sterling company. As it was receiving income from plantations and from other activities in India, it is assessable in India as well, in respect of such profits. The assessment years relevant for the purposes of these references are 1965-66 and 1966-67. The company had installed machineries in the course of the accounting years relevent to the assessment years 1958-59 to 1966-67. On these meterials, it

claimed development rebate. The eligibility of the claim is governed by section 34(3) of the income tax Act, which reads thus:

34. Conditions for depreciation allowance and development rebate -

(1) ** ** **

(2) ** ** **

(3)(a) The deduction referred to in section 33 shall not be allowed unless an amount equal to seventy-five per cent of the development rebate to be actually allowed is debited to the profit and loss account of the relevant previous year and credited to a reserve account to be utilised by the assessee during a period of eight years next following for the purposes of the business of the undertaking, other then--

(i) for distribution by way of dividends or profits; or

(ii) for remittance outside India as profits or for the creation of any asset outside India:

Provided that this clause shall not apply where the assessee is a company, being a licensee within the meaning of the Electricity (Supply) Act, 1948 (54 of 1948), or where the ship has been acquired or the machinery or plant has been installed before the 1st day of January, 1958:

Provided further that where a ship has been acquired after the 28th day of February, 1966, this clause shall have effect in respect of such ship as if for the words ''seventy-five'', the word ''fifty'' had been substituted.

Explanation: For the removal of doubts, it is hereby declared that the deduction referred to in section 33 shall not be denied by reason only that the amount debited to the profit and loss account of the relevant previous year and credited to the reserve account aforesaid exceeds the amount of the profit of such previous year (as arrived at without making the debit aforesaid) in accordance with the profit and loss account.

The section insists on the assessee creating a development rebate reserve, equal to 75 per cent of the development rebate to be actually allowed, by debiting to the profit and loss account of the relevant accounting year and crediting to a reserve account to be utilised by the assessee during a period of eight years next following for the purpose of the business other than for distribution of dividends or for remittance outside India. It is enough to notice at this stage that utilisation of the reserve for the prohibited purposes of distribution of dividends or remittance outside India disqualify the assessee from the benefit of the development rebate. The assessee in this case had income from cultivation and manufacture of tea. That income was partly agricultural and partly non-agricultural. Rule 8 of the income tax

Rules, 1962 had application to the case. Under that rule, 40 per cent of the income derived from the sale of tea grown and manufactured by a seller in India is to be deemed to be liable to income tax. The statement of the case has given the following table which shows the reserves created u/s 34(3), the development rebate available without applying the provisions of rule 8, 75 per cent of such development rebate and 75 per cent of the development rebate after applying the provisions of rule 8. The said table is as follows:

Assessment year	Reserve actually created	Development rebate (full amount shown in the computation of income) and not 40%	75% of the full amount of development rebate	75% of 40% of total development rebate being what is actually allowed under the Act
	₹	₹	₹	₹
1959-60	11,850	13,304	9,978	3,991
1960-61	13,500	18,194	13,645	5,458
1961-62	5,500	7,697	5,773	2,309
1962-63	6,500	8,459	6,344	2,538
1963-64	5,800	7,440	5,580	2,232
1964-65	8,750	11,623	8,717	3,487
1965-66	18,200	24,245	18,184	7,274
1966-67	17,000	22,460	16,845	6,738
	87,100	1,13,422	85,066	34,027

From the table it will be seen that the total reserves actually created in the books from the assessment years 1959-60 to 1966-67 is ₹ 87,100. The total reserves from 1958-59 to 1966-67 was ₹ 87,750. For the assessment year 1965-66, the ITO had allowed the development rebate of ₹ 24,245 (before applying rule 8). The assessee should create 75 per cent of the development rebate, that is, only ₹ 18,184. It only created a development reserve of ₹ 18,200. The balance-sheet for the year had added this amount to the development rebate reserve already shown for the earlier year.

2. For the assessment year 1966-67, the development rebate allowed was ₹ 22,460. The assessee had created a reserve off 17,000. The Tribunal commented that these figures would establish that the development rebate reserve created by the company was on the high side of 75 per cent required under the statute. This is after

proceeding on the assumption that 100 per cent of the income is taxable and rule 8 does not apply. But the assessee being a tea company and only 40 per cent of the income from the business being taxable to central income tax, the development reserve need be only 75 per cent of the taxable income, i.e., 75 per cent of 40 per cent. As the assessee had created reserves on 100 per cent of the income, it was the Tribunal''s view that there was no deficiency in respect of development reserves.

3. The ITO withdrew, the development rebate allowed to the assessee for the assessment year 1966-67. For the assessment year 1965-66, he substituted a development rebate of only Rs. 78,221 as against Rs. 2 lakhs and odd originally allowed. On appeal to the AAC, that the ITO found that it had not been established that the development rebate had been utilised for distribution of dividends which was prohibited u/s 34(3). He also found that the assessee had created development rebate for all the assessment years 1959-60 to 1966-67 very much in excess of what is actually required. It was his finding that the development rebate reserve was more than what was required by the terms of the section.

4. The department appealed to the Tribunal. Agreeing with the AAC, the Tribunal found that the reserve required for all these years was only 45,222, whereas there was in existence reserve, even after appropriation, of 55,064. The contention of the department that the excess of the earlier year was not available for the subsequent year, was found to be against facts. The Tribunal also adverted to the columns in paragraph 3 and found that in every year there was an excess of development reserve. The Tribunal, therefore, held that the withdrawal of this excess would not offend the provisions of section 34(3) and it was only the excess portion of the reserve which was found unnecessary that had been siphoned off. In such circumstances, it was of the view that nothing had been established to disentitle the assessee to the benefit of development rebate. The Tribunal dismissed the department''s appeal. The Tribunal agreed with the AAC that while the reserves for all these years was only 45,222, there was in existence a reserve of 55,064. The Tribunal was of the view that in every year there was an excess of development reserve and the excess had been siphoned off only in the accounting year which ended on 31-03-1967. It is not as if the assessee had utilised the excess of one year to compensate the deficiency for any subsequent year. As there was an excess of reserve created in all these years, there was no question of such excess being utilised in subsequent years. In view of the clear finding of the Tribunal as above, we think nothing has been made out to show a contravention of section 34(3) which would justify action u/s 155(5). The view taken by the Tribunal was correct. We answer the question referred in the affirmative, that is, in favour of the assessee and against the revenue. There will be no order as to costs.