(1993) 02 BOM CK 0107

Bombay High Court

Case No: Income-tax Reference No. 129 of 1978

Commissioner of Income Tax		APPELLANT
	Vs	
Super Tool Co. Pvt. Ltd.		RESPONDENT

Date of Decision: Feb. 2, 1993

Acts Referred:

- Income Tax Act, 1961 - Section 147, 2(14), 2(47), 84, 84(1)

Citation: (1993) 114 CTR 153 : (1993) 202 ITR 50

Hon'ble Judges: U.T. Shah, J; B.P. Saraf, J

Bench: Division Bench

Advocate: G.S. Jetley, S.J. Mehta, for the Appellant;

Judgement

DR. B.P. Saraf, J.
By this reference u/s 256(1) of the Income Tax Act, 1961, made at the instance of the Revenue, the Income Tax Appellate Tribunal has referred the following question of law for opinion :

"Whether, on the facts and in the circumstances of the case, the assessee was entitled to the relief u/s 84 of the Income Tax Act 1961, for the assessment year 1965-66 ?"

2. The assessee is a private limited company incorporated on April 28, 1960, for carrying on the business of manufacturing carbide-tipped tools. It started production on January 1, 1961. The accounts of the assessee for the first time were closed on March 31, 1961. Thereafter, the financial year was adopted as the accounting year. The manufacture of carbide tools was originally started by a firm known by the name and style of M/s. Standard Tool Company which had erected a factory building and installed its own plant and machinery, and started production in 1959. The original idea was to convert the firm into a private limited company but, on account of certain unforeseen difficulties with the Registrar of Companies, a separate company, which is the present assessee, was required to be floated and

the manufacturing licence obtained by the firm was got transferred to the assessee-company. The assessee-company did not have its own building or plant and machinery. It, therefore, occupied the firm''s building and used the firm''s plant and machinery for the purpose of carrying on its business of manufacturing carbide-tipped tools under an agreement with the firm. Under the agreement, the assessee-company was to pay to the firm rent of Rs. 1,500 per month for the use of the factory building and hire charges of Rs. 2,500 per month for the use of machinery and electrical installations. Though the agreement was initially for a period of eleven months commencing from the date of the agreement, i.e., December 22, 1960, it is an agreed position that it continued throughout till the accounting year relevant to the assessment year 1965-66. The assessee claimed that being a newly established industrial undertaking, it was eligible to obtain relief u/s 84 of the Income Tax Act, 1961 ("the Act"). Such relief was originally given to the assessee by the Income Tax Officer for the assessment years 1963-64 and 1964-65 by passing orders u/s 154 of the Act, but section 147(b) of the Act. A similar claim made by the assessee for the year under consideration, viz., assessment year 1965-66, was rejected by the Income Tax Officer. Though the Income Tax Officer agreed with the assessee that no question of transfer was involved in occupying the factory building, so far as the machinery was concerned, he held that there was a transfer to the new business started by the assessee-company and consequently the relief could not be allowed as laid down in section 84(2)(ii) of the Income Tax Act.

3. On appeal, the Appellate Assistant Commissioner of Income Tax ("the AAC") held that the new undertaking of the assessee was not formed by splitting up or reconstruction of a business already in existence and also that there was no transfer to the new business of building, machinery and plant previously used by the firm. He, therefore, held that the prohibition contained in sections 84(2)(i) and 84(2)(ii) was not attracted and the assessee was entitled to the relief u/s 84 of the Act. He, therefore, allowed the appeal of the assessee.

4. Aggrieved by the order of the Appellate Assistant Commissioner, the Revenue went in appeal to the Tribunal. The Tribunal affirmed the order of the Appellate Assistant Commissioner. It was held that the assessee''s case could not be said to be one either of splitting up or of reconstruction. The Tribunal also held that there was no transfer involved in the present case. The latter conclusion was arrived at by the Tribunal on the basis of its opinion that "the word ''transfer'' in contradistinction to the word ''lease'' should be understood as involving the concept of conveyance of building machinery or plant and the lease or licence could not be termed as a ''transfer''." In that view of the matter, the Tribunal confirmed the order of the Appellate Assistant Commissioner and held that the benefit of section 84 could not be denied to the assessee. Hence, this reference at the instance of the Revenue.

5. Section 84 of the Income Tax Act, as it stood at the relevant time, provides for relief to be granted to newly established industrial undertakings to the extent of 6%

per annum on the capital employed in such undertakings. Sub-section (2) thereof lays down the conditions which are to be fulfilled to be entitled to avail of this benefit. Section 84, so far as relevant, reads as follows :

"84. Income of newly established industrial undertakings or hotels. - (1) Save as otherwise hereinafter provided, Income Tax shall not be payable by an assessee on so much of the profits and 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 the prescribed manner.

(2) This section applies to any industrial undertaking which fulfills all the following conditions, namely :-

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

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

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

(iv) in a case where the industrial undertaking manufactures or produces articles, it employs ten or more workers in a manufacturing process carried on with the aid of power, or employs twenty or more workers in a manufacturing process carried on without the aid of power :"

6. It may be expedient to mention that, by Act 20 of 1967, two provisos were added to the above sub-section (2) with effect from April 1, 1967. Though these proviso are not applicable to the relevant assessment year 1965-66, the second proviso has an important bearing on the interpretation of sub-section (2) as it stood prior to its insertion. This proviso is, therefore, set out below :

"Provided further that the condition in clause (ii) shall be deemed not to have been contravened if the industrial undertaking is set up in rented premises."

7. It is evident from a plain reading of section 84(1) that the special relief contemplated by this sub-section is available only to newly established industrial undertakings on fulfilment of the conditions mentioned in sub-section (2). The two conditions relevant for the purpose are : (i) that such undertaking is not formed by the splitting up or the reconstruction of a business already in existence and (ii) it is not formed by the transfer, to a new business, of building, machinery or plant previously used for any purpose. A careful perusal of these two conditions clearly

goes to show that the benefit under the scheme is intended to be given only to undertakings which are in the real sense "newly established" industrial undertakings. If the undertaking is already in existence and, out of such existing undertaking, a new industrial undertaking has been created, the benefit is not available. Similarly, this section will not apply and its benefit will not be available, if there is a transfer to the new business of building, machinery or plant previously used for any purpose. The admitted position in the instant case is that the assessee-company did not have its own building, machinery or plant for the manufacture or production of the articles. It had taken the same on lease from the existing partnership firm which itself had been using the same for the last 2-3 years for the purpose of manufacture. The taking over of these assets from the partnership was effected by an agreement dated December 22, 1960, under which the assessee had to pay to the owner thereof, i.e., the firm, an amount of Rs. 1,500 per month for the use of factory building and hire charges of Rs. 2,500 per month for the use of machinery and electrical installations. The question that falls for determination is whether, on these facts, it can be said that the industrial undertaking of the assessee-company was not formed by the transfer to the new business of building, machinery and plant previously used by the firm. The Income Tax Officer was of the opinion that there was no transfer of the building which was given on rent but there was a transfer of machinery and plant which were given on hire. Accordingly, he held that the assessee did not fulfil the condition laid down in clause (ii) of sub-section (2) of section 84 of the Act and, as such he was not entitled to the relief under the said section. The Appellate Assistant Commissioner and the Tribunal were of the view that in the lease of the factory building and hiring of the plant and machinery no transfer was involved. The Tribunal was of the opinion that the word "transfer" in contra-distinction to the word "lease" should be understood as involving the concept of conveyance of the building, machinery or plant. According to the Tribunal, in the present case, the assessee had only been permitted the use of the machinery under a leave and licence agreement and as such it could not be said that there was a transfer of the machinery to the assessee.

8. Learned counsel for the Revenue, Mr. G. S. Jetley, submits that the entire approach of the Appellate Assistant Commissioner and the Tribunal was not correct. According to him, the Tribunal gave too restricted a meaning to the word "transfer". His submission is that the word "transfer" has to be accorded its normal meaning which includes "lease". Counsel also referred to the provisions of the Transfer of Property Act, 1882, in this regard. Learned counsel also submitted that a bare reading of the agreement dated December 22, 1960, between the assessee-company and the partnership firm itself goes to show that in effect it was a lease of the building on rent and of the machinery and electrical installations for hire and the terminology used in the agreement cannot be determinative of the true nature of the transaction. According to learned counsel, it was a clear case of lease of the building and hiring of the machinery and electrical installations and that

being so, it is a clear case of transfer. Counsel also pointed out that the assessee-company did not have any machinery, building or electrical installations of its own for its manufacturing activity. The business of manufacture was set up by the assessee-company only by the transfer to its new business of the factory, building, machinery and electrical installations previously used for the purpose of manufacture of the same products by the partnership firm. In that view of the matter, it is submitted that the Tribunal was not correct in holding that the assessee was entitled to relief u/s 84(1) of the Act.

9. We have carefully considered the submission. We have also perused the provisions of section 84, more particularly sub-section (2) (ii) thereof. The word "transfer" has been defined in section 2(47) of the Act in the following terms :

"2(47) ''transfer'', in relation to a capital asset, includes the sale, exchange or relinquishment of the asset or the extinguishment of any rights therein or the compulsory acquisition thereof under any law."

10. "Capital asset" again has been defined in section 2(14) to mean property of any kind held by the assessee whether or nor connected with his business or profession except those specified in the four sub-clauses thereof which are not relevant for our purpose. The Supreme Court in the case of A.R. Krishnamurthy and Another Vs. Commissioner of Income Tax, Madras, had occasion to consider the meaning of the expression "transfer of a capital asset". It was dealing with a mining lease. The question was whether the "grant of a mining lease" amounts to "transfer of a capital asset". The Supreme Court referred to the decision of the Division Bench of the Patna High Court in TRADERS AND MINERS LTD. Vs. COMMISSIONER OF Income Tax, BIHAR AND ORISSA., , which had already been referred to with approval by the Supreme Court in its earlier decision in R.K. Palshikar (HUF) Vs. Commissioner of Income Tax, M.P., Nagpur, . The following passage from the decision of the Patna High Court (at page 345) was quoted with approval by the Supreme Court in A.R. Krishnamurthy and Another Vs. Commissioner of Income Tax, Madras,

"We think that the expression ''transfer'' in the section includes not only a permanent transfer but also a temporary transfer of title to the property in question and lease of mines for any period would fall within the ambit of section 12B of the Act. It was also contended by Mr. Dutt that a transaction of lease did not tantamount to a transfer of title but that a mere contractual right was created. We do not think that this argument is correct. A lease of land is transfer of title in favour of the lessee though the lessor has right of reversion after the period of the lease terminates."

11. Reference may also be made to the decision of Kerala High Court in Blue Bay Fisheries (P.) Ltd. Vs. Commissioner of Income Tax, , where Dr. T. K. Thommen J. (as his Lordship then was), interpreting the expression "transfer", as defined in the Income Tax Act, held (at page 7) :

"Significantly, it is an inclusive definition. It specifically refers to sale, exchange, relinquishment, extinguishment or compulsory acquisition. These five categories are specified by way of illustration or for abundant caution and not to exclude other categories which naturally come within the expression ''transfer''. The expression must be read widely and not narrowly. The definition denotes extension and cannot be treated as restricted."

12. In the case before the Kerala High Court, it was an agreement between the parties for lease of a trawler for a period of ten months. There was also a right of reversion in favour of the transferor. The court held it to be a transfer.

13. Reference may be made to a decision of this court in Capsulation Services Pvt. Ltd. Vs. Commissioner of Income Tax, Bombay City-I, . In this case also, a controversy similar to the one before us came up for consideration. In that case, the claim was made u/s 15C(2) (i) of the Indian Income Tax Act, 1922, which is in pari materia with a section 84. In this case also, it was contended that the words "transfer to a new business of building" implied that there was a transfer of ownership of the building. This submission was repelled by this court and it was held (at page 574) :

"The word ''building'' ordinarily is not the only thing which is the subject-matter of the ownership but includes also dominion or the right of ownership or of partial ownership. It is the most comprehensive of all terms which can be used inasmuch as it is indicative and descriptive of every possible interest which the party can have. Ordinary modes of transfer as referred to in the Transfer of Property Act are sale, mortgage, lease, gift and exchange. In the case of sale, gift and exchange there may be complete transfer of ownership. But, in the other two cases of transfers, namely, mortgage or lease, the entire bundle of rights that go to constitute ownership are not transferred but some limited rights or interest in or to the property are transferred. Even in the case of mortgage or lease immovable property, it is well-settled that it is a transfer of property. The words ''transfer to a new business of building'' cannot, therefore, be restricted to a case ''where full rights of ownership are transferred'', but they will be wide enough to include within their scope cases where even rights or interest to or in such building is created. A lease of an immovable property as defined under the Transfer of Property Act is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of price paid or promised, or of money. The consideration under this definition may also take the shape of a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms. In our opinion, the words ''transfer to a new business of building...'' used in clause (i) of sub-section (2) of section 15C are wide enough to include cases where a transfer is created by creation of a lease in a building in favour of the new business or the person carrying on the new business."

14. In the aforesaid decision, this court also referred to the provisions of section 84 of the new Act. The court also repelled the contention of the assessee that the monthly tenancy was not a lease. It was observed (at page 578 of 91 ITR) :

"A lease of an immovable property may be for a certain time, express or implied, or in perpetuity. A monthly tenancy of a building is a lease from month to month until it is duly terminated in the matter provided by section 111 of the Transfer of Property Act. A monthly lease of a building is a lease of a property of which the duration is from month to month until duly terminated. It does not cease to be transfer by way of lease."

15. From the decisions referred to above, it is clear that the word "transfer" cannot be given a narrow meaning. It has to be interpreted in a broader sense in the context in which it is used. So interpreted, it will take within its ambit lease of building or machinery or plant. The word "transfer" has been used in section 84(2)(ii) which expression has been defined in the Act and has a definite connotation. If the intention of the Legislature had been to take out lease of building, etc., from the expression "transfer" and to allow the benefit even to industrial undertakings set up specifically said so and instead of using the expression "transfer", it might have used the expression "purchase" in its place.

16. This view of ours gets full support from the insertion of the second proviso to sub-section (2) by Act 20 of 1967, with effect from April 1, 1967, which, by a deeming provision, takes out of the scope of "transfer" referred to in clause (ii), lease of premises. It provides that the condition in clause (ii) shall be deemed not to have been contravened if the industrial undertaking is set up in rental premises. As a natural corollary, in the absence of this deeming provision, the condition in clause (ii) is violated if the industrial undertaking is set up in rented premises. Evidently, this deeming provision is not applicable to the assessment year 1965-66 to which this reference relates. Besides, in the case under reference, not only building, even the machinery and electric installations were previously used and had been obtained by the assessee by transfer on payment of a monthly rent/hire.

17. Moreover, from a conjoint reading of the two clauses (i) and (ii) of sub-section (2), it is clear that the whole idea is that the industrial undertaking should be in the true sense a new industrial undertaking. It should not be formed by transfer of building, machinery or plant previously used for any purpose. These two clauses read together make it abundantly clear that the new business of manufacture formed by transfer of building, machinery or plant previously used by another firm for the purpose of manufacture does not fulfil the requirements of section 84 of the Act and, as such the assessee is not entitled to rebate thereunder.

18. In view of the foregoing discussion, we are of the clear opinion that the Tribunal was not justified in holding that there was no transfer of machinery, plant, electrical installations, which had been previously used, to the new business of the assessee

and in coming to the conclusion that the assessee was entitled to relief u/s 84(1) of the Act for the assessment year 1965-66. We, therefore, answer the question referred to us in the negative that is in favour of the Revenue and against the assessee. Under the facts and circumstances of the case, we make no order as to costs.