

(1992) 11 BOM CK 0093

Bombay High Court

Case No: Income-tax Reference No. 281 of 1977

Commissioner of Income Tax

APPELLANT

Vs

Smt. Malatibai M. Karajgar (By
Legal Heirs of Shri M.G. Karajgar)

RESPONDENT

Date of Decision: Nov. 6, 1992

Acts Referred:

- Income Tax Act, 1961 - Section 155, 155(5), 2(47), 33, 45

Citation: (1993) 202 ITR 835

Hon'ble Judges: Sujata V. Manohar, J; B.N. Srikrishna, J

Bench: Division Bench

Advocate: Dr V. Balasubramanian, for the Appellant;

Judgement

B.N. Srikrishna, J.

One M. G. Karajgar of Kolhapur was carrying on business as an individual. He had installed and was working certain plant and machinery on which he had claimed, and was allowed, relief by way of development rebate u/s 33 of the Income Tax Act, 1961. The said Karajgar died before his Income Tax assessment for the assessment years 1967-68, 1968-69 and 1969-70 were taken up and finalised by the Department. The Income Tax Officer proceeded against his widow, Malatibai, in the capacity of the deceased's legal heir under the provisions of section 155 of the Act. The said Karajgar died on July 18, 1968, i.e., in the previous year relevant for the assessment year 1969-70. He died intestate, and, upon his death, the ownership of the business carried on by him devolved on his legal heirs under the provisions of the Hindu Succession Act, 1956, who were the widow, Malabai, his married daughter, Mrs. C. A. Somawanshi, and his three, minor sons, all five of them shard the deceased's property, including the business, equally. On August 17, 1968, Malatibai and Mrs. Somawanshi entered into a partnership to carry on the business which was hitherto being carried on by the late Karajgar as a proprietary concern. This partnership was made effective from July 19, 1968. Apart from the two partners, the eldest minor son

of the deceased Karajgar, by name Vijay, was admitted to the benefits of the said partnership, while the other two minor sons were not so admitted. However, the partnership-firm entered into an agreement separately with the other two minor sons through their guardian, so that their 1/5th share each in the business, assets, which had devolved upon them by the death of their father, was also hired out to the partnership-firm on the basis of a monthly royalty and some annual interest. It is, thus, with effect from July 19, 1968, that a new entity, viz., the partnership firm, came into existence and carried on the business which had been earlier carried on by the deceased Karajgar.

2. In the assessment proceedings of the assessee, the Income Tax Officer took the view that, by reason of the legal heirs of the deceased Karajgar having thrown in their respective shares of the property inherited from the deceased's business into a newly constituted partnership-firm, the said Act amounted to a transfer of the assets, on which development rebate had been allowed u/s 33, and, since the said transfer had taken place within a period of eight years from the end of the previous year in which such machinery had been installed, the development rebate which had been allowed on such machinery was to be withdrawn by virtue of section 155(5) of the Income Tax Act, 1961. Though, strictly, the Income Tax Officer ought to have first allowed the development rebate in the pending assessment and then withdrawn it by exercising his powers u/s 155(5) read with section 154, since the assessments for the assessment years 1967-68 and 1969-70 were still not made, the Income Tax Officer just disallowed the claim for development rebate in these two years for the aforesaid reason. Being aggrieved, the assessee appealed, and, in appeal, the Appellate Assistant Commissioner upheld the view of the Income Tax Officer. The Tribunal took the view that, upon the death of a person, though his legal personality dies and becomes destitute of any rights and liabilities, the rights would remain and devolve upon and vest in his legal representatives and do not become extinct as such. Consequently, the Tribunal took the view that, upon the death of Karajgar, and the legal heirs inheriting his business assets, there was no transfer of the concerned assets at all. Even though the assets stood transferred to a newly constituted partnership-firm, the Tribunal was of the view that, since the legal heirs constituted the firm, there was no transfer. Upon this reasoning, the Tribunal reversed the order of the lower authority on the issue of allowing development rebate for the concerned assessment year. However, by way of abundant caution, the Tribunal had also recorded its finding that, in case the throwing of the assets into the newly constituted partnership amounted to a transfer then, inasmuch as two minor sons had not done so with regard to their share to the extent of 2/5ths of the business assets, the question of withdrawal of development rebate would not arise.

3. At the instance of the Revenue, the Tribunal has referred, u/s 256(1) of the Income Tax Act, 1961, the following question of law for the opinion of this Court :

"Whether, on the facts and circumstances of the case, the Tribunal was justified in holding that there was no transfer of machinery and plant, etc., within the meaning of section 155(5) of the Income Tax Act, 1961, so as to entitle the assessee to deduction of the development rebate u/s 33 of the Act ?"

4. There are two issues which need to be considered for the purpose of answering the question referred from the opinion of this Court. The first, is there a transfer within the meaning of section 2(47) of the Income Tax Act, 1961, when a person dies and his business assets devolve upon his legal heirs ? Second, is there a transfer where some of the legal heirs who have inherited property commonly from a deceased ancestor, constitute a partnership-firm and bring in their respective shares as capital of the newly constituted partnership-firm ?

5. The first question is easily answered, in view of the Supreme Court judgment in [Sunil Siddharthbhai Vs. Commissioner of Income Tax, Ahmedabad, Gujarat](#) . Though the question was considered by the Supreme Court in the context of section 45 of the Act, in order to consider whether there were capital gains, the Supreme Court pointed out that, in its general sense, the expression "transfer of property" connotes the passing of the rights in property from one person to another. In one case, there may be a passing of the entire bundle of rights from the transferor to the transferee. In another case the transfer may consist of one of the estates only out of all the estates comprising the totality of rights in the property. In a third case, there may be a reduction of the exclusive interest in the totality of rights of the original owner into a joint or shared interest with other persons. An exclusive interest in property is a larger interest than a share in that property. To the extent to which the exclusive interest is reduced to a shared interest, it would seem that there is a transfer of interest. Therefore, when a partner brings in his personal asset into the capital of the partnership-firm as his contribution to its capital, he reduces his exclusive rights in the asset to shares rights in it with the other partners of the firm. While he does not lose his rights in the asset altogether, what he enjoys now is an abridged right which cannot be identified with the fullness of the right which he enjoyed in the asset before it entered the partnership capital. The Supreme Court derived support from its earlier judgments in [Addanki Narayanappa and Another Vs. Bhaskara Krishtappa and Others](#), and [Commissioner of Income Tax, Bangalore Vs. B.C. Srinivasa Setty](#) . In the light of the ratio of Sunil's judgment [Sunil Siddharthbhai Vs. Commissioner of Income Tax, Ahmedabad, Gujarat](#) , it would appear to us that the exclusive rights of the two partners to partnership having been reduced to a shared right, albeit between themselves, and the test laid down by the Supreme Court in the above case would equally apply to the situation of the assessee. The definition in section 2(47) of the Act of the expression "Transfer" is wide enough to apply to the throwing of the individual shares of Malatibai and Mrs. Somawanshi into the capital of the partnership. Hence, there was a transfer of the assets which had been used by the deceased Karajgar in his business, and in regard to which development rebate had been allowed u/s 33 of the Income Tax Act, 1961, within

the period of eight years. Consequently, the development rebate allowed on the assets was liable to be withdrawn.

6. In these circumstances, the question referred is answered in the negative and in favour of the Revenue.