(1994) 11 BOM CK 0062

Bombay High Court

Case No: Income-tax Reference No. 130 of 1983

Vita Pvt. Ltd.	APPELLANT
Vs	
Commissioner of Income Tax	RESPONDENT

Date of Decision: Nov. 10, 1994

Acts Referred:

- Finance Act, 1975 - Section 2(8)

Citation: (1995) 123 CTR 256 : (1995) 211 ITR 557 : (1995) 79 TAXMAN 158

Hon'ble Judges: S.M. Jhunjhunwala, J; B.P. Saraf, J

Bench: Division Bench

Advocate: K.B. Bhujle, for the Appellant; G.S. Jetley, for the Respondent

Judgement

DR. B.P. Saraf, J.
At the instance of the assessee, the Income Tax Appellate Tribunal has referred the following question of law to this court for opinion u/s 256(1) of the Income Tax Act, 1961 :

"Whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that the assessee-company was not engaged in the business of manufacturing of goods within the meaning of the definition of an industrial company u/s 2(8) (c) of the Finance Act, 1975 ?"

2. The assessee is a private limited company. This reference pertains to the assessment year 1975-76, the corresponding previous year being the year ended on September 30, 1974. Prior to March 23, 1972, apart from other activities, the assessee was engaged in the business of manufacturing and selling various kinds of brushes including tooth brushes, hair combs and articles, tooth paste and other toilet articles which were marketed by it under its own brand names. For this purpose, it installed machinery in a building occupied on rent. A number of employees were also employed by it in the factory. On March 23, 1972, the assessee entered into an agreement with Bombay Forgings Pvt. Ltd. under which the right to

carry on the abovementioned business for a period of five years with effect from March 16, 1972, was given to that company. The said company was to pay to the assessee a sum of Rs. 12,999 per month as consideration for the right to conduct the said business. The business was to be carried on by the said company at its won risk and responsibility. The assessee was not responsible for the same in any manner.

3. In the course of assessment for the assessment year 1975-76, the assessee claimed that it was liable to pay tax at the concessional rate applicable to industrial companies as it continued to be an industrial company despite the above agreement. It was contended by the assessee before the Income Tax Officer that though it itself did not carry on any manufacturing activity during the previous year relevant to the assessment year under consideration, by virtue of the income received by it from letting out the factory to Bombay Forgings Pvt. Ltd., it should be still deemed to be an "industrial undertaking" within the meaning of section 2(8) (c) of the Finance Act, 1975. According to the assessee, it continued its business of manufacturing goods in the year under consideration through the instrumentality of the lessee, Bombay Forgings Pvt. Limited. The contention of the company was not accepted by the Income Tax Office. Appeals of the assessee to the Appellate Assistant Commissioner and the Appellate Tribunal were also rejected. The Tribunal held that after the letting out of the factory with effect from March 16, 1972, the assessee did not carry on the business or activity consisting of manufacture of goods, and, hence, it could not be held to be an industrial company with the meaning of section 2(8) (c) of the Finance Act, 1975. Hence, this reference at the instance of the assessee.

4. We have heard learned counsel for the assessee. Section 2(8) (c) of the Finance Act, 1975, which defines an "industrial company" reads as under :

""'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."

5. From a reading of the above definition, it is absolutely clear that a company can be termed as an industrial company u/s 2(8) (c) of the Finance Act, 1975, only if it is "mainly engaged" :

(i) in the business of generation or distribution of electricity or any other form of power; or

(ii) in the construction of ships; or

(iii) in the manufacture or processing of goods; or

(iv) in mining.

6. It can be deemed to be mainly engaged in the manufacture or processing of goods, etc., if the income attributable to the manufacture or processing of goods, etc., included in its total income of the previous year is not less than 51 per cent. of such total income.

7. The assessee-company in this case claims to be engaged in the manufacture or processing of goods. The Tribunal did not accept the above contention of the assessee and held that the assessee having parted with the entire apparatus required for the manufacturing of goods for a period of five years from March, 1972, and being in receipt of a monthly royalty or consideration for the same irrespective of the fact whether the lessee manufactured or processed any goods or not, it cannot be said that it was "engaged" in the manufacture or processing of goods. We find ourselves in agreement with the above conclusion of the Tribunal. A company cannot be held to be a industrial company merely by virtue of its ownership of plant or machinery or factory premises. For that purpose, it must be mainly engaged in the manufacture or processing of goods. Neither the ownership or possessing of the manufacturing plant or machinery nor the ownership of the raw materials or the manufactured goods is the determinative factor for that purpose. A company engaged in the manufacture of goods would continue to be an industrial company even if it manufactures or processes goods for a third party for remuneration or consideration, if the income therefrom is not less than 51 per cent. of its total income. But it would cease to be an industrial company if it suspends or stops the manufacturing activity and hands over the manufacturing apparatus to some third person for use in the manufacture or processing of goods. In that event, it cannot claim to be itself engaged in the manufacture or processing of goods. It can no longer be termed a manufacturer, because a manufacturer is a person by whom or under whose direction or control the goods are manufactured or processed. It is, therefore, essential that the assessee itself is engaged in the manufacture or processing of goods.

8. We may now examine the facts of the present case in the light of the above legal propositions. By the agreement in question, the right to carry on the business of manufacturing and selling brushes, etc., was given to the lessee. Under clauses 2, 11, 21, 22, 23 and 24, the lessee was given the licence to use the premises in which the factory of the assessee was situated together with the machinery and other apparatus required for the manufacturing activity. The employees and workmen employed by the assessee earlier for carrying out the manufacturing activity

continued to be employed by the lessees. The lessees were also permitted to reorganise, expand and even diversify the business. Clause 20 made it clear that the business was to be carried on by the lessees at their own risk and responsibility. For all that, the lessees were to pay to the assessee a sum of Rs. 12,999 per month a royalty or consideration for the right to conduct the said business. This amount was payable irrespective of the fact whether the lessees manufactured or processed any goods or not. These facts clearly go to show that after the agreement dated March 23, 1972, the assessee ceased to be engaged in the manufacturing or processing of goods and hence no part of the income of the assessee was attributable to such activity. The lease rent or royalty received by the assessee cannot be termed as income attributable to any manufacture or processing of goods undertaken by the assessee.

9. In that view of the matter, the assessee-company cannot be held to be an industrial company with the meaning of section 2(8) (c) of the Finance Act, 1975. The authorities below, including the Tribunal, were, therefore, justified in holding that the assessee was not an industrial company. Accordingly, we answer the question referred to us in the affirmative and in favour of the Revenue.

10. Under the facts and circumstances of the case, there shall be no order as to costs.