Commissioner of Income Tax Vs Shrishakti Trading Co.

Court: Bombay High Court

Date of Decision: Sept. 16, 1993

Acts Referred: Income Tax Act, 1961 â€" Section 155, 155(1), 155(5), 33, 33(4)

Citation: (1994) 207 ITR 442

Hon'ble Judges: D.R. Dhanuka, J; B.P. Saraf, J

Bench: Division Bench

Advocate: G.S. Jetley, A.V. Sonde, for the Appellant;

Judgement

Dr. B.P. Saraf, J.
By this reference, pursuant to the order of the court u/s 256(2) of the Act, the Income Tax Appellate Tribunal has

referred the following two questions of law for opinion :

1. Whether, on the facts and in the circumstances of the case and having regard to the fact that cash balance on hand and in the bank belonging to

the assessee-firm did not become the property of Shree Shakti Insulated Wire Private Ltd., which succeeded to the other assets including plant

and machinery and the business of the assessee-firm under the agreement dated February 14, 1963, the development rebate which have been

allowed to the assessee-firm for the assessment years 1961-62 to 1962-63 must be deemed to have been wrongly allowed having regard to

clause (i) of the Explanation to section 33(4) read with section 34(3) of the Income Tax Act, 1961, and as such withdrawing the development

rebate for the said assessment years and taking action u/s 155(5)(i) was justified ?

2. Whether, on the facts and in the circumstances of the case, the assessee-firm was not entitled to any allowance by way of development rebate

for the assessment year 1963-64 ?

2. The first question arises on account of withdrawal of the development rebate granted to the assessee by taking resort to the provisions of section

155(5)(i) of the Act. The controversy in the second question pertains to disallowance of development rebate to the assessee at the very outset.

The reason for disallowance in the assessment year 1963-64, of course, is the same which resulted in withdrawal of the development rebate

already allowed in the assessment years 1961-62 and 1962-63, viz., non-compliance with the requirements of sub-section (4) of section 33 of the

Act on the ground that the transfer of the business by the assessee to the limited company did not fall within the ambit of sub-section (4).

3. Section 33 of the Act provides for allowance of deduction by way of development rebate in respect of new machinery, plant, etc., acquired by

the assessee in the year of acquisition if it is first put to use in the immediately succeeding previous year fulfilment of the conditions specified therein.

Section 155(5) of the Act, however, provides for withdrawal of development rebate already allowed, if, at any time before the expiry of eight

years from the end of the previous year in which the machinery or plant was installed by the assessee, it is sold or otherwise transferred by the

assessee to any person other than those specified in clause (i) thereof or in connection with the amalgamation or succession referred to in sub-

section (3) to sub-section (4) of section 33 of the Act. Transfers in cases covered by sub-section (3) and (4) of section 33 of the Act constitute an

exception to transfers covered by section 155(1). Section 155(1), therefore, does not apply to transfers in cases referred to in those two sub-

sections.

4. The contention of the Revenue is that in the instant case, the transfer effected by the assessee does not fall either under sub-section (3) or sub-

section (4) of section 33 of the Act. According to the assessee, section 155(1) has no application as the transfer is as a result of succession to the

business of the assessee-firm by a company.

5. For a proper appreciation of a controversy, it may be expedient to set out some of the provisions of the Act having a bearing of the point at

issue as they stood at the material time. Section 155(5) of the Act, which provides for withdrawal of depreciation allowance in certain cases, so far

as relevant, reads :

S. 155. (5) Where an allowance boy way of development rebate has been made wholly or partly to an assessee in respect of a ship, machinery or

plant installed after the 31st day of December, 1957, in any assessment year u/s 33 or under the corresponding provisions of the Indian Income

Tax Act, 1922 (XI of 1922), and subsequently -

(i) at any time before the expiry of eight years from the end of the previous year in which the ship was acquired or the machinery or plant was

installed, the ship, machinery or plant is sold or otherwise transferred by the assessee to any person other than the Government, a local authority, a

corporation established by a corporation established by a Central, State or Provincial Act or a Government company as defined in section 617 of

the Companies Act, 1956 (1 of 1956), or in connection with any amalgamation or succession referred to in sub-section (3) or sub-section (4) of

section 33; or....

the development rebate originally allowed shall be deemed to have been wrongly allowed, and the Income Tax Officer may, notwithstanding

anything contained in this Act, recompute the total income of the assessee for the relevant previous year and make the necessary amendment; and

the provisions of section 154 shall, so far as may be, apply thereto, the period of four years specified in sub-section (7) of that section being

reckoned from the end of the previous year in which the sale of transfer took place or the money was so utilised.

6. Sub-section (3) and (4) of section 33 read :

(3) Where, in a scheme of amalgamation, the amalgamating company sells or otherwise transfers to the amalgamated company any ship,

machinery or plant in respect of which development rebate has been allowed to the amalgamating company under sub-section (1) or sub-section

(1A), -

(a) the amalgamated company shall continue to fulfil the conditions mentioned in sub-section (3) of section 34 in respect of the reserve created by

the amalgamating company and in respect of the period within which such ship, machinery or plant shall not be sold or otherwise transferred and in

default of any of these conditions, the provisions of sub-section (5) of section 155 shall apply to the amalgamated company as they would have

applied to the amalgamating company had it committed the default and

(b) the balance of development rebate, if any, still outstanding to the amalgamated company in accordance with the provisions of sub-section (2)

so, however, that the total period for which the balance of development rebate shall be carried forward in the assessments of the amalgamating

company and the amalgamated company shall not exceed the period of eight years specified in sub-section (2) and the amalgamated company shall

be treated as the assessee in respect of such ship, machinery or plant for the purposes of this section and section 34.

(4) Where a firm is succeeded to by a company in the business carried on by it as a result of which the firm sells or otherwise transfers to the

company any ship, machinery or plant, the provisions of clauses (a) and (b) of sub-section (3) shall, so far as may be, apply to the firm and the

company.

Explanation. - The provisions of this clause shall apply only where -

(i) all the property of the firm relating to the business immediately before the succession becomes the property of the company;

(ii) all the liabilities of the firm relating to the business immediately before the succession become the liabilities of the company and

(iii) all the shareholders of the company were partners of the firm immediately before the succession.

7. It is clear from the above provisions that the right to development rebate would not be lost in cases of amalgamation of two companies and

succession of a firm by a company.

8. The controversy in this case is whether all the requirements of the Explanation to sub-section (4) of section 33 are fulfilled in this case to justify

the application of the said sub-section to bring the case out of the purview of section 155(5) of the Act.

9. The facts of the case giving rise to this controversy, briefly stated, are as follows :

10. The assessee is a partnership firm. It installed new machinery in the previous years relevant to the assessment years 1958-59 to 1962-63. Its

claim for development rebate on such newly installed machinery in the aforesaid years was allowed during the assessments of those years as the

conditions set out in section 10(2)(vib) of the Indian Income Tax Act, 1922 (corresponding to section 33 of the 1961 Act), were satisfied. Later,

in the year 1962, a company in the name of Shree Shakti Insulated Wire Private Limited was incorporated with the main object of acquiring the

business of the assessee-firm as a going concern. In pursuance of this object, the said company entered into an agreement with the assessee-firm

on February 14, 1963, to purchase the business of the assessee-firm as a going concern. By sub-clause (2) of clause 1 of the said agreement, all

the plant and machinery, equipment, tools, machines, motor cars, spare parts, accessories, etc. (excluding cash in hand and at banks amounting in

all to Rs. 9,196) was transferred. By sub-clause (3) of clause 1, all the books debts and other debts due to the assessee-firm in connection with its

business and the full benefit of all securities for such debts were transferred to the company. By sub-clause (4) of clause 1, full benefits of licences,

quotas and concessions in respect of machinery and raw materials and all other rights and privileges held by the assessee-firm in connection with its

business were transferred to the company. In short, all the rights, assets, liabilities held by the assessee-firm which could be thought of, excluding

only cash in hand and at banks amounting to Rs. 9,196, were transferred to the company. Though the deed of agreements was actually executed

on February 14, 1963, it was given retrospective effect from January 1, 1963. As a result, all the rights and liabilities of the assessee-firm,

excluding only the cash in hand and at banks amounting to Rs. 9,196, as on December 31, 1962, were transferred by the assessee-firm to the

newly formed company. The Income Tax Officer, being of the opinion that the transfer in question amounted to transfer of machinery and not

succession of the business of the firm by the company, passed an order u/s 155(5) of the Act withdrawing the development rebate originally

allowed thereon.

11. In the previous year relevant to the assessment year 1963-64, the assessee had installed new machinery in respect of which a claim was made

for deduction by way of development rebate. This claim was also rejected by the Income Tax Officer on the ground that the assessee had sold and

transferred the newly installed machinery to the company by agreement dated February 14, 1963. The above orders of the Income Tax Officer

were upheld by the Appellate Assistant Commissioner of Income Tax and the appeals of the assessee disallowed. The assessee appealed to the

Income Tax Appellate Tribunal (""the Tribunal""). The Tribunal decided in favour of the assessee and held that the Income Tax Officer erred in

withdrawing the development rebate already allowed and in refusing to grant the same for the assessment year 1963-64. While arriving at the

above conclusion, the Tribunal observed that in the circumstance of the case it was impossible to hold that the omission to transfer an insignificant

amount of Rs. 9,196 detracts from the transfer of all the property of the firm to the company. It further observed : ""The assessee, in our opinion,

not only transferred its substantial property of the firm.

12. The Revenue filed applications u/s 256(1) for reference which were rejected by the Tribunal on the ground that no question of law did arise out

of its order. The Revenue approached this court u/s 256(2) of the Act. This court, being of the opinion that the questions sought to be referred by

the Revenue were questions of law, directed the Tribunal to draw up a statement of the case and refer the questions of law to this court for

opinion. Hence this reference.

Mr. G.S. Jetly, J.

13. learned counsel for the Revenue, submits that section 155(5) of the Act has to be construed strictly. It is for an assessee who claims the benefit

of the exception to satisfy the Income Tax Officer that the conditions attached to the exception are fully complied with. In the instant case, the

assessee wants to get out of the consequences of section 155(5) on the ground that the transfer was in connection with succession of business by a

company referred to in sub-section (4) of section 33. It was, therefore, for the assessee to satisfy the Income Tax Officer with regard to the

fulfilment of the conditions laid down in the Explanation thereto. According to the Revenue, one of the conditions that all the property of the firm

relating to the business immediately before the succession should become the property of the company has not been satisfied in the instant case by

retention of cash in hand and with the banks aggregating to Rs. 9,196. Counsel for the assessee, on the other hand, submits that in view of the

undisputed position that all the assets of the firm worth more than 32 lakhs of rupees had been transferred to the company, non-transfer of cash at

hand and with banks amounting to Rs. 9,196 cannot militate against the factum of cash transfer of all the property. Counsel further submits that

transfer of cash balance lying with the assessee for consideration expressed in terms of the cash would have been a superfluous exercise and an

idle formality. According to him, the transfer of the machinery was in connection with succession of business within the meaning of sub-section (4)

of section 33 and the Explanation thereto.

14. We have carefully considered the rival submissions in the light of the facts of the case and the provisions of section 155(5) read with section

33(4) of the Act. The undisputed factual position is that the company was formed with the object of acquiring the business of the assessee-firm as

a going concern. It was in pursuance of this object that the company entered into an agreement with the assessee-firm to purchase its business as a

going concern, which resulted in the transfer of all plant and machinery (including the newly installed machinery in respect of which deduction by

way of development rebate had been allowed), equipment, tools, machines, motor cars, spare parts, accessories, etc., belonging to the firm to the

company. All debts due to the assessee-firm in connection with its business, quotas and concessions in respect of machinery and raw materials and

other rights and privileges held by the assessee-firm in connection with its business also stood transferred to the company. The business of the firm

transferred to the company as a going concern was valued at Rs. 32 lakhs. The only asset that was not transferred was cash in hand and at banks

amounting to Rs. 9,196 According to the Revenue, the retention of cash amounting to Rs. 9,196 took the transfer of business by the assessee-firm

to the company out of the purview of sub-section (4) of section 33 of the Act. It ceased to be a case of succession as one of the requirements of

the Explanation to section 33(4) was not satisfied by retention of the above amount. The question that falls for determination is whether it is so. The

answer will depend upon the true and proper interpretation of the provisions of the sections 155(5) and 33(4) of the Act.

15. Section 155(5) is a deeming provision. It provides that the development rebate allowed originally in respect of certain machinery and plant,

etc., shall be deemed to have been wrongly allowed if, within eight years, the assessee sells or transfers such machinery or utilises the amount

credited to the reserve in any manner specified therein. For this purpose transfers made to specified persons and in connection with any

amalgamation or succession referred to in sub-section (3) or sub-section (4) of section 33 have been taken out. Transfer in cases falling within the

exceptions will not attract section 155(5) of the Act and development rebate originally allowed would not be affected by such transfer. Thus,

section 155(5) is a deeming provisions which is intended to withdraw the development rebate originally allowed if subsequently the assessee acts in

any manner specified therein. It creates a legal fiction that if the assessee does any of the acts specified therein, the development rebate originally

allowed shall be deemed to have been wrongly allowed. It is well-settled that legal fictions are for a definite purpose and they are limited to the

purpose for which they are created and should not be extended beyond that legitimate field. It is also a well-settled rule of interpretation that in

construing the scope of a legal fiction, it is proper and even necessary to assume all those facts on which alone the fiction can operate. A

construction which defeats the very purpose sought to be achieved by the Legislature must, if possible, be avoided.

16. The uncontroverted legal position is that the legal fiction contained in section 155(5) does not operate if the sale is in connection with

succession referred to in section 33(4) of the Act. Section 33(4) applies to cases ""where a firm is succeeded to by a company in the business

carried on by it as a result of which the firm sells or otherwise transfers to the company any ship, machinery or plant"". Evidently, the event

contemplated by this provisions is succession to the business of the firm by the company. If that event takes place, the resultant transfer of

machinery, etc., if any, stands on a different footing from transfers in the ordinary course. Such transfers are taken out of the ambit section 155(5)

of the Act by specific exclusion contained therein. The Explanation to section 33(4) appears to have been added to ensure that a succession for the

purpose of the above provision is a real succession and not a subterfuge or device to avoid the consequences of transfer of assets within the

specified time. One of the requirements is that ""all the property of the firm relating to the business immediately before succession becomes the

property of the company.

17. The question that arises for consideration is whether, in a case like the one before us, where the entire business of the assessee-firm as a going

concern including all assets, liabilities, rights, privileges, benefits, etc., worth Rs. 32 lakhs was transferred to the company formed for the purpose,

can it be said that there was no succession, only because cash in hand and with the banks amounting to Rs. 9,196 was not transferred. On a

careful consideration of the provisions of section 155(5) read with section 33(4) of the Act and the scheme and object thereof, we are of the clear

opinion that non-transfer of cash in hand and with banks amounting to Rs. 9,196 cannot in any way affect the succession of the business of the

assessee by the company as a going concern. To fall within the exception to section 155(5) contained in section 33(4) of the Act, what is

necessary is that the firm is succeeded by a company in the business carried on by it and as a result of such succession the firm sells or otherwise

transfers the machinery and plant, etc., to the company. It is evident that in cases falling u/s 33(4) also, there is a transfer of machinery and plant,

etc., by the assessee to the company with the only difference that such transfer is occasion as a result of succession to the business of the firm by

the company. The three requirements contained in the Explanation to section 33(4) are intended to ensure that there is a succession in the true

sense of the term which results in transfer of plant and machinery and not a transfer simpliciter of plant and machinery in the garb of succession.

The Explanation sets out the conditions with a view to restrict the benefit of section 33(4) to cases of real succession and it is that context that

provides, inter alia, that all the property and liabilities of the firm relating to the business should become the property and liabilities of the company.

Though, strictly speaking, cash may also be termed as property but in the context of succession of business, transfer or non-transfer of cash does

not appear to have any significance. In the context and setting, the requirements of the Explanation to section 33(4) of the Act should be construed

reasonably. A literal construction would defeat the obvious intention of section 33(4) and produce a wholly unreasonable result. In such a case, as

observed by this court in Ajit Investment Co. Private Ltd. and Another Vs. K.G. Malvandkar, Sub-registrar, Bombay Suburban Division, , if

necessary, the court should ""do some violence to the words"" to achieve the obvious intention of the Legislature and produce a rational

construction. As observed by the Supreme Court in Bhudan Singh and Another Vs. Nabi Bux and Another, , justice and reason constitute the

great general legislative intent in every piece of legislation. Consequently, where the suggested construction operates harshly, ridiculously or in any

other manner contrary to prevailing conceptions of justice and reason, in most instances, it would seem that the apparent or suggested meaning of

the statute was not one intended by the law-makers. In the absence of some other indication that the harsh or ridiculous effect was actually

intended by the Legislature, there is little reason to believe that it represents the legislative intent.

18. Reference may also be made in this connection to the latest decision of the Supreme Court in Commissioner of Income Tax, Bombay Vs.

Gwalior Rayon Silk Manufacturing Co. Ltd., , where dealing with the principles of interpretation of taxing statutes, it was observed (at page 156) :

It is settled law that the expressions used in a taxing statue would ordinarily be understood in the sense in which it is harmonious with the object of

the statute to effectuate the legislative intention..... It is equally settled law that if the language is plain and unambiguous one can only look fairly at

the language used and interpret it to give effect to the legislative intention. Nevertheless, tax laws have to be interpreted reasonably and in

consonance with justice adopting a purposive approach. The contextual meaning has to be ascertained and given effect to. A provision for

deduction, exemption or relief should be construed reasonably and in favour of the assessee.....

19. Applying the principles set out above, it is clear that in the instant case the transfer of the plant and machinery was the result of succession of

business of the assessee by the company. In our opinion, it will be too hypertechnical an interpretation of the requirement of the Explanation to

section 33(4) to say that though there was succession to the business of the assessee as a going concern by the company as a result of which all the

assets and liabilities including plant and machinery got transferred to the company, it would cease to be a case of ""succession"" because of non-

transfer of cash amounting to Rs. 9,196. Transfer of this amount, in any event, would have been a mere formality and a futile exercise because it

would have been a merely added to the consideration in terms of rupees for the transfer of the business. Non-transfer of it cannot militate against

the factum of succession.

20. In view of the above discussion and having regard to the facts and circumstances of the case, we are fully satisfied that the conditions of section

33(4) are satisfied in the instant case and the provisions of section 155(5)(i) are, therefore, not attracted. Accordingly, we are of the opinion that

the Tribunal was justified in holding that the Income Tax Officer was not correct in withdrawing the development rebate which had been allowed to

the assessee-firm for the assessment years 1961-62 and 1962-63 by taking resort to section 155(5)(i) of the Act and refusing to allow

development rebate for the assessment year 1963-64 on the very same ground.

21. We, therefore, answer both the questions referred to us in the negative, that is, in favour of the assessee and against the Revenue.

22. Having regard to the facts and circumstances of the case, there shall be no order as to costs.