

MAHABIR COLD STORAGE  
v.  
COMMISSIONER OF INCOME TAX, PATNA

DECEMBER 7, 1990

[KULDIP SINGH AND K. RAMASWAMY, JJ.]

*Income Tax Act, 1961—Section 31(1)—Development rebate—Entitlement to unity of ownership and use of asset in business not to be disrupted.*

The appellant-assessee is a registered firm. It started functioning w.e.f. May 3, 1956 at Purnea as the branch office of the partnership firm M/s Prayagchand and Hanumanmal Periwal with its Head Office at Calcutta. The firm consisted of two partners Prayagchand Periwal and Hanumanmal Periwal.

The partners had taken loan from Periwal & Co. Pvt. Ltd for erection of cold storage at Purnea and for its running capital. Later, Periwal & Co. was taken as a partner in the Purnea Branch for better management and financial assistance. The newly constituted partnership obtained separate registration under the Income Tax Act, 1922 as well as under the income Tax Act, 1961 and was separately assessed from the assessment year 1960-61.

In the assessment year 1959-60 Prayagchand Hanumanmal installed machinery of the value of Rs.5,80,055 in Sri Mahabir Cold Storage. For one reason or the other development rebate on the capital asset, namely, the machinery, was not claimed till the assessment year 1962-63 in which year the appellant claimed development rebate. The Income-tax Officer, and on appeal the Assistant Appellate Commissioner, disallowed the claim on the finding that the new firm had neither inherited the claim as a transferee, nor did it amount to a succession. But on second appeal, the Tribunal held that the appellant firm was nothing more than the old firm of M/s. Prayagchand Hanumanmal with a change in the constitution, and the continuity of the business remained in tact; hence the appellant was the owner of the plant and machinery installed in the assessment year 1959-60.

The High Court answered the question referred to it in favour of the Revenue. The High Court held that the business at Purnea was carried on by the newly constituted partnership firm which itself

**A** claimed to be a separate identity under the Income Tax Act, and had obtained separate registration. The High Court observed that in respect of the plant or machinery installed by the old partnership firm at Calcutta, the new firm at Purnea, a distinct and different assessable identity, could not claim development rebate either under the repealed Act or the 1961 Act.

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Before this Court it was *inter alia* contended that (i) M/s. Prayagchand Hanumanmal consisting of original partners, had taken M/s. Periwal and Co. merely for the purpose of better management and financial assistance; (ii) the old partnership had been continuing to have its identity as an assessable entity whose character had not been lost by taking as new partner M/s Periwal and Co. (Pvt) Ltd. for the purpose of benefit of profits only, and hence the assessee was entitled to the development rebate under section 33 of the Income-Tax Act.

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**D** On behalf of the Revenue it was contended that the appellant was not "the assessee", nor the owner of the machinery and plant; the owner was M/s. Prayagchand Hanumanmal and as such the assessee was not entitled to the development rebate.

Dismissing the appeal, this Court,

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**HELD:** (1) Under both the repealed Act as well as the 1961 Act two conditions precedent were required to be fulfilled for entitlement to development rebate, namely, the new machinery or plant installed must be (1) owned by the assessee and (2) used wholly for the purpose of the business carried on by him. There must exist unity of ownership and use in the business. [475A, F]

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(2) Only the successor in interest of the business, in accordance with the provisions of the Act, so long as the twin requirements under section 33(1) are fulfilled, is entitled to the benefit. [475G]

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(3) When the unity of ownership and use of the asset in the business is disrupted or a branch of an earlier business is taken over by a new firm which exists simultaneously with the other branches of the old business, the benefit of development rebate under Section 33(1) does not extend to either firm. [475H]

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(4) The appellant assessee is a new identity under the Act. It is not a successor in interest of the old firm as per the provisions of the Act. [476G]

(5) Section 33(1) gives right to development rebate only to the owner who has acquired the ship or installed the machinery or plant. The necessary implication is that the assessee who claims development rebate should continue to remain to be the owner of the ship or plant or machinery during the relevant previous assessment year/years and the owner alone is entitled to the development rebate till it becomes nil. [476H-477A]

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 469(NT) of 1976.

From the Judgment and Order dated 11.9.1974 of the Patna High Court in Tax Case No. 30 of 1972.

B. Sen, S.K. Gambhir and Vivek Gambhir for the appellant.

K.P. Bhatnagar, S.K. Garg and Ms. A. Subhashini (NP) for the respondent.

The Judgment of the Court was delivered by

**K. RAMASWAMY, J.** This appeal by the assessee is directed against the judgment of the Division Bench, Patna High Court made in Tax Case No. 30 of 1972 dated September 11, 1974 answering in favour of the Revenue and against the assessee the question reframed thus:

“Whether on the facts and in the circumstances of this case the order of the Tribunal allowing the unabsorbed development rebate in respect of the plant and machinery not installed by the assessee, under section 33(1) of the Income Tax Act was legal and proper”.

The Tribunal referred the question, at the instance of the Revenue, to the High Court under section 256(1) of the Income-Tax Act, 1961 (for short ‘the Act’) which reads thus:

“Whether in the facts and circumstances of the case, the order of the Tribunal holding that the conditions under section 33(1) of the Income Tax Act are satisfied, is legal and proper”.

The appellant-assessee is a registered partnership firm under a deed executed and registered on November 10, 1958 between Prayagchand Periwal and Hanumanmal Periwal and M/s Periwal and Co. Pvt.

A Ltd. having its business at Purnea in Bihar State. It derives income from the business of cold storage. M/s Prayagchand Hanumanmal, partnership firm consists of Prayagchand and Hanumanmal Periwal with 50 per cent share each and started its business with its Head Office at Calcutta and a Branch Office at Purnea. It started functioning w.e.f. May 3, 1956. The Branch Office at purnea carried on the business in the name and style of Shri Mahabir Cold Storage. The partners had taken loan from Periwal & Co. Pvt. Ltd. for erection of Cold Storage and for its running capital. Later the Company was taken as a partner for better management and financial assistance. Prayagchand and Hanumanmal each has 25 per cent and Periwal and Co. (P) Ltd. has the remaining 50 per cent shares in the profits of the newly constituted partnership M/s Mahabir Cold Storage at Purnea. The new partnership also obtained registration under the Indian Income-tax Act 1922 (for short 'the repealed Act') and later under the Act. It filed voluntary returns and it was separately assessee from the assessment year 1960-61 and thereafter.

D In the assessment year 1959-60 M/s Prayagchand Hanumanmal installed machinery of the value of Rs.5,80,055 in Sri Mahabir Cold Storage. For one reason or the other development rebate on the capital asset, namely, the machinery was not claimed till the assessment year 1962-63 in which year the appellant claimed development rebate. The Income-tax Officer and on appeal the Asstt. Appellate Commissioner disallowed the claim on the finding that the new firm had neither inherited the claim as a transferee, nor it amounts to a succession. But on second appeal, the Tribunal held in favour of the appellant with the following finding:

F "It is no doubt that the machinery was installed by M/s Prayagchand Hanumanmal but the firm has been reconstituted with the three partners under the name and style of M/s Mahabir Cold Storage, the appellant herein. The firm's legal personality will survive its reconstitution. Reconstitution of the firm does not bring into existence a different legal entity, nor can it be stated that the original identity of the firm is lost as a result of reconstitution. The business as a unit continued unbroken and it was only the interest of the partners that came to be altered as a result of the reconstitution of the firm. Since the appellant firm is nothing more than the old firm of M/s Prayagchand Hanumanmal with a change in the constitution and the continuity of the business remained intact, we have no hesitation

in coming to the conclusion that the appellant is the owner of the plant and machinery installed in the assessment year 1959-60".

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At the request of the Revenue the Tribunal referred the question as indicated above and the High Court reframed the question extracted hereinbefore and answered with the finding in favour of the Revenue and against the assessee with the reasoning that the old firm retained its identity carrying on its business separately at Calcutta. It was a separate entity for the purpose of taxation. The whole firm was not reconstituted. The business at Purnea was carried on by a new reconstituted partnership firm which itself claimed to be a separate identity under the Income-tax Act and claimed separate registration and was separately assessed to Income-tax. An assessee who installed the new plant or machinery must carry on the business with him in order to get development rebate and it must not transfer them before the expiry of 8 years. If the identity of the two firms was different, an assessable identity was clearly so, then it was plain that in respect of the plant or machinery installed by the old partnership firm at Calcutta the new firm at Purnea, a distinct and different assessable identity, could not claim development rebate either under the repealed Act or the Act. The appellant which had not installed the new machinery and plant was not entitled to any development rebate in respect of machinery and plant worth Rs.5 lakhs and odd installed in the previous year relating to the assessment year 1959-60 by M/s Prayagchand Hanumanmal.

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Shri B. Sen, learned Sr. Counsel for the appellant raised two fold contentions. According to the learned counsel M/s Prayagchand Hanumanmal consisting of original partners Prayagchand Perival and Hanumanmal Perival, merely had taken M/s Perival and Co. (P) Ltd. for the purpose of better management and financial assistance. The old partnership admittedly having started its branch at Purnea in Cold Storage business has been continuing to have its identity as an assessable entity whose character has not been lost by taking new partner M/s Perival and Co. (P) Ltd. for the purpose of benefit of profits only. Therefore, the assessee is entitled to the development rebate under section 33 of the Act. Alternatively it is contended that in the books of account of M/s Prayagchand Hanumanmal as a creditor with a sum of Rs.3,50,000 in all on two dates in its accounts for the year ended October 31, 1959 debited the amount of the three partners of the assessee as they stood in the books of the old firm. Correspondingly the new firm also in its turn transferred Rs.3,50,000 to the credit

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- A of the partners account by debiting the account of the old firm showing the opening balance of Rs.4,25,606. It would, thus, show that there is a transfer of the capital asset to the appellant and thereby the appellant is an owner under section 33 of the Act. Accordingly it is entitled to development rebate. Shri. Bhatnagar, the learned counsel for the Revenue contended that the appellant is not "the assessee", nor the owner of the machinery and plant. The owner is M/s Prayagchand Hanumanmal and as such the assessee is not entitled to the development rebate.

- C To appreciate the contentions it is necessary to see the relevant provisions under the repealed Act and the Act. Development rebate was first introduced by the Finance Act, 1955 with effect from 1st April, 1955, clause (vib) of sub section (2) of Section 10 of the repealed Act was introduced by Section 8 of the said Finance Act, which was subsequently amended by Section 7 of the Finance Act, 1958 with effect from 1st April, 1958 and then again it was amended by Section 6 of finance Act, 1961 with effect from 1st April, 1961 which is relevant for the purpose of this case, read thus:

"10.(1) . . . . .

(2) such profits or gains shall be computed after making the following allowances, namely:

(vib) In respect of a new ship acquired or new machinery or plant installed after the 31st day of March, 1954, which is wholly used for the purposes of the business carried on by the assessee., a sum by way of development rebate in respect of the year of acquisition of the ship or of the installation of the machinery or plant, equivalent to"

Section 33(1) of the new Act reads:

"33(1) In respect of a new ship acquired or new machinery or plant (other than office appliances or road transport vehicles) installed after the 31st day of March, 1954, which is owned by the assessee and is wholly used for the purposes of the business carried on by him, a sum by way of development rebate, equivalent to-

The other sub-sections are not relevant. Hence omitted.

Under both the repealed Act as well as the Act two conditions precedent are required to be fulfilled for entitlement to development rebate, namely, a new ship acquired or new machinery or plant installed must be (1) owned by the assessee and (2) is wholly used for the purpose of the business carried on by him. It is an admitted case that the plant and machinery was wholly used for the purposes of cold storage business carried on by the original firm M/s Prayagchand Hanumanmal and also by the appellant. The only dispute is whether the appellant owned the plant and machinery purchased and erected as a part of the capital asset to run the cold storage business by M/s Prayagchand Hanumanmal. In the context of Section 33(1) of the Act the ownership consists of bundle of rights, namely, title to; possession of and beneficial enjoyment thereof. It is an indisputable legal position that the sum to be allowed by way of development rebate was to be only such amount as was sufficient to reduce the total income to nil. If the development rebate to the extent to which it had not been allowed in the previous assessment year or succeeding years, the aforesaid sum was to be carried forward to the following year or years upto a maximum of 8 years during which time the entire amount invested is computed in the manner prescribed under the Act to nil. The object thereby is that the development rebate in the manner specified under the repealed Act or the Act was to be allowed in full. If any, residue remains after the expiry of eight years, that amount was not to be adjusted and no balance could be carried forward to the 9th year.

The capital asset, namely, the ship, plant or machinery should be owned by the assessee during the relevant accounting year and wholly used in the business carried on by the assessee during the previous year in question. There must exist unity of ownership and used in the business. The emphasis for entitlement to rebate accrues from the use of the machinery or the plant by the owner for the purpose of its business resulting in the manufacture of the goods or service. It is not the ownership of the goods or the resultant end product of the raw materials used that is relevant. The only relevant consideration is that during the previous year or part of the relevant period ownership of the asset shall remain with the assessee. Only the successor in interest of the business, in accordance with the provisions of the Act, so long as the twin requirements under section 33(1) are fulfilled is alone entitled to the benefit. But when the unity of ownership and use of the asset in the business is disrupted or a branch of an earlier business is taken over by a new firm which exists simultaneously with the other branches of the old business, the benefit of development rebate under section 33(1) does not extend to either firm. Take for instance, an assessee

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- A leases the asset to another person during the previous accounting year, the use of the plant and machinery is not for the business of the assessee for which the development allowances were accorded under section 33(1) since the machinery was not wholly used by the assessee for his/its business during the previous accounting year. Suppose a plant or machinery was used for a purpose other than the business of the assessee, even then also the assessee is not eligible for development rebate, obviously for the reason that the plant or machinery was not used for the purpose of the business of the assessee in the previous accounting year or a portion thereof.

- C The crucial question, therefore, is whether the appellant is the owner of the machinery and plant in the relevant assessment year 1962-63. Acquisition of ownership is a condition precedent to avail of the development rebate under section 33(1) of the Act. It is now fairly clear from the statement of facts that the old and the new partnership firms are separately registered under the Act and the old one was doing its business at Calcutta and the new one at Purnea. They have been separately being assessed as independent assessable entities. Only the new firm alone was reconstituted consisting of the two partners of the old firm M/s. Prayagchand Hanumanmal and Periwal & Co. (P) Ltd. Prayagchand and Hanumanmal individually are entitled to 25 per cent shares each for the profits in the appellant firm and Periwal & Co. (P) Ltd. has 50 per cent shares of profit. Under the Indian Partnership Act, 1932 the partnership firm registered thereunder is neither a person nor a legal entity. It is merely a collective name for the individual members of the partnership. A firm as such cannot be a partner in another firm though its partners may be partners in another firm in their individual capacity. Either under the repealed Act or the Act a firm is liable to be separately assessed to tax as well as all its partners in their capacity as individuals if they have taxable income. The appellant is separately registered under section 26A of the Act and assessed to tax from the assessment year 1960-61 and onwards. There is no re-constitution of the original firm Prayagchand Hanumanmal inducting Periwal & Co. (P) Ltd. as its partner. Thus it is clear that the appellant assessee is a new identity under the Act. It is not a successor in interest of the old firm as per the provisions of the Act. The question then is whether the assessee is entitled to development rebate under section 33(1) of the Act. (under section 10(1) (vib) of the repealed Act). Section 33(1) gives right to development rebate only to the owner who has acquired the ship or installed the machinery or plant. The necessary implication is that the assessee who claims development rebate should continue to remain to be the

owner of the ship or plant or machinery during the relevant previous assessment year/years and the owner alone is entitled to the development rebate till it becomes nil in the relevant previous assessment year or the succeeding assessment years carried forward upto 8 years and not thereafter.

The entries in the books of accounts of the appellant would amount to an acknowledgement of the liability to M/s. Prayagchand Hanumanmal within the meaning of Section 18 of the Limitation Act, 1963 and extend the period of limitation for the discharge of the liability as debt. Section 2(47) of the Act defines 'transfer' in relation to a capital asset under clause (i) the sale, exchange or relinquishment of the asset or (ii) the extinguishment of any right thereof of—(Clauses (iii) to (vi) are not relevant hence omitted). Unfortunately the assessee did not bring on record the necessary material facts to establish that he became owner by any non-testamentary instrument acquiring right, title and interest in the plant and machinery nor the point was argued before the High Court and we do not have the benefit in this regard either of the Tribunal or of the High Court. In this view we decline to go into the question but confine to the first question and agree with the High Court answering the reference in favour of the revenue and against the assessee that the appellant is not entitled to the development rebate under section 33(1) of the Act. The appeal is accordingly dismissed with costs quantified at Rs.5,000.

R.S.S.

Appeal dismissed.

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