Karnataka High Court Shankar Construction Co. vs Commissioner Of Income-Tax on 8 November, 1990 Equivalent citations: 1991 189 ITR 463 KAR, 1991 189 ITR 463 Karn Author: M C Urs Bench: K Navadgi, M C Urs JUDGMENT M.P. Chandrakantaraj Urs, J. 1. The above I.T.R.C.s are consolidated together and disposed of by the following common order as the question referred to us for answer by the Tribunal either at the instance of the assessing authority or at the instance of Revenue are the same. Before setting out the questions referred to us, we briefly state that the assessee in I.T.R.C. Nos. 138 and 139 of 1985 is M/s. Shanker Construction Co., Balglore. A registered firm carrying on business in manufacture and sale of tiles and construction work on a somewhat large scale specialising in constriction of dams and channels. Similarly, the assessee in I.T. R.C. Nos. 217 and 218 of 1985 is M/s. Shanakaranarayana Construction Co., Bangalore. The assessee in the case of I.T.R.C. Nos. 27 of 1986 is Naveen Mechanised Construction Co., (P.) Ltd., Hubli. 2. In the first four cases, the assessee for thi relevant assessment years, viz., 1978-79 and 1979-80, claimed allowance at the rate of 25% of the value invested by them in plant and machinery employed in the execution of their construction work at the sitter of the construction which came to be disallowed by the assessing authority. On appeal to the Commissioner of Income-tax (Appeals)-I, Bangalore, the appeal came to be allowed on the ground that the assessee-firm carrying on business activities were in the nature of an "industrial undertaking" and as such was entitled to the benefit of the ruling of the High Court of Orissa in the case of CIT v. N.C. Budharaja and Co. [1980] 121 ITR 212. As well as in the case of CIT v. Presure Piling Co., (India) (P.) Ltd. [1980] 126 ITR 333 (decided by the Orissa High Court and the High Court of Judicature, Bombay, respectively). The Revenue went up in appeal to the Income-tax Appellate Tribunal, Bangalore Bench, against those orders of the Commissioner of Income-tax (Appeals). The Tribunal. By its order, following the ruling of the Special Bench of the Tribunal rendered earlier, came to the conclusion that the two decisions of the High Courts relied upon by the Commissioner (Appeals) were decided on other provisions of the Income-tax Act, then section 32A of the Income-tax Act ("the Act" for short). They have referred to the ruling of the Special Bench that the company engaged in the Construction of dams and channels could not be held to be an industrial undertaking and, therefore, the Commissioner was in error in permitting allowance under sub-cluse (i) of clause (b) of sub-section (2) of section 32A of the Act. 3. In the last of the cases, viz., I.T.R.C. No. 27 of 1986, M/s. Naveen Mechanised Construction Co., (P.) Ltd., the claim was disallowed by the assessing authority. But, on appeal, filed, it was given allowance under the very same provision. On appeal by the Revenue, the appellate order was confirmed by the Tribunal following the same decision. In that circumstances, the question which has been set out hereafter has been referred for our answer in all these cases : The questions as follows : "Whether, on the facts and in the circumstances of the case, the Tribunal is justified in law in upholding the disallowance of investment allowance ?" 4. The question as formulated, we feel, is not correct. Therefore, we reformulated the question under the circumstances and the facts of the case as follows : "Whether, on the facts and in the circum-

stances of the case, the allowance provided for under sub-clause (iii) of clause (b) of sub-section (2) of section 32A of the Act will ensure to the benefit of the assessee ?" 5. Sub-section (2) of section 32A of the Act, relevant for our purpose and applicable to the relevant assessment years in questions, reads as follows : "32A. Investment allowance-. . . (2) The ship or aircraft or machinery or plant referred to in sub-section (1) shall be the following namely :- (a) a new ship or new aircraft acquired after the 31st day of March, 1976, by an assessee engaged in the business of operation of ships or aircraft; (b) any new machinery or plant installed after the 31st day of March, 1976 - (i) for the purposes of bushiness of generationor distribution of electricity or any other form of power; or (ii) in a small-scale industrial undertaking for the purpose of business of manufacture or production of any article or thing; or (iii) in any other industrial undertaking for the purposes of business of construction, manufacture or productions of any article or thing not being an article or thing specified in the list in the Eleventh Schedule". 6. From the language employed in section 32A(1) of the Act, it is clear that investment allowance equal to 25% of the actual cost of plant to the assessee should be given deduction, on that question, there is no dispute between the assessee and the Revenue. The dispute between the assessee and the Revenue. The dispute centers round the question whether the assessee are to be considered to have engaged themselves in industrial activities by undertaking construction work falling within the definition or description of "industrial undertaking" occurring in sub-clause (iii) of clause (b) of sub-section (2) of section 32A of the Act. 7. We feel that the Tribunal was in some haste in the first four cases in following the Special Bench's decision and denying the benefit to the assessee without application of its own mind to the question. In the circumstance of the case of the assessee in the first four cases, on consideration by us, as held by the High Court of Orissa in the case of CIT v. N.C. Bidaraja and Co., [1980] 121 ITR 213. The law is fairly settled that in the absence of a statutory definition, it would be open to look for the meaning by reference to definition is a sister legislation and, failing that, to adopt the meaning in common parlance. It is too late in the day to say that the word "industrial undertaking" has not fallen for judicial consideration. It is possible to refer to numerous decisions. But it would be most useful to refer to the decisions of the Supreme Court in Bangalore Water Supply and Swerage Board v. A. Rajappa , wherein the words "industry" and "undertaking" fell for consideration and certain other earlier decisions were specifically overruled. It suffices for us to extract the following passage to drive home the meaning of the expression "industrial undertaking" occurring in sub-section (iii) of clause (b) of sub-section (2) of section 32A of the Act it is as follows (headnote of AIR 1978 SC) : "Industry" as defined in section 2(j) has a wide import. 8. Where there is (i) systematic activity; (ii) organised by co-operation between employer and employee (the direct and substantial element is chimerical, (iii) for the production and/or distribution of goods and services calculated to satisfy man wants and wishes (not spiritual or religious but inclusive of material things or services geared to celestial bliss, e.g., making on a large scale, prasad or goods), prima facie, there is an 'industry' in that enterprise. 9. Absence of profit motive or gainful objective is irrelevant, be the

venture in the public, joint, private or other sector. 10. The true focus is functional and the decisive test is the nature of the activity with special emphasis on the employer-employee relation. 11. If the organisation is a trade or business, it does not cease to be one because of philanthropy animating the undertaking. 12. Although section 2(j) uses words of the widest amplitute in its two limbs, their meaning cannot be magnified to overreach itself. 13. 'Undertaking' must suffer a contextual and associational shrinkage as explained in D N Banerji v. P. R. Mukherjee , so also, service calling and the like. This yields the inferce that all organised activity possessing the triple elements above mentioned, although not trade or business, may still be 'industry' provided the nature of the activity, viz., the employer-employee basis, bears resemblance to what is found in trade or business. This takes into the fold of 'industry' undertakings, callings and services, adventures analogous to the carrying on of trade or business. All features, other than the methodology of carrying on the activity, viz., in organising the co-operation between employer and employee. May be dissimilar. It does not matter, if on the employment terms there is analogy". 14. It is needless for us to point out that the above ruling is binding on us. 15. In the matter of Sree Yallamma Cotton, Woollen and Silk Mills Co. Ltd., [1970] 40 Comp Cas 466, 485; AIR 1969 Mysore 280, late Justice A, narayana Pai (as he then was), sitting as company judge, had occasion to judicially examine the expression"undertaking" in the context of "floating charge". The learned judge ruled as follows (headnote of AIR 1969 Mys.) : " 'Undertaking' is not in the real meaning anything which may be described as a tangible piece of property like land, machinery or the equipment; it is in actual effect an activity of man which in commercial or business parlance means an activity engaged in with a view to earn profit Property, movable or immovable, used in the course of or for the purpose of such business, can more accurately be described as the tools of business or undertaking, i.e., things or article which are necessarily to be used to keep the undertaking going or to assist the carrying on of the activities leading to the earning of profits". 16. Similarly, the High Court of Madras in CIT v. M. R. Gopal [1965] 58 ITR 598, came to the conclusion that the process employed in cavorting boulders into small stones with the aid of machinery is a manufacturing process and the undertaking is an "industrial undertaking". 17. The High Court of Judicature, Bombay, in the case of CIT v. Oricaon Private Ltd. [1985] 151 ITR 296, following the ruling of the High Court of Madras in CWT V. K. Lakshmi [1984] 142 ITR 656, ruled that merely because the assessee had given sub-contracts for a part of the work, it would not lose its character of being an industrial company (See [1984] 16 Taxman 100). We must only point out that, in that case, it was disputed whether the company which was carrying on the business of construction of building was carrying on the business of construction of building was an industrial company or not. Therefore, we have referred to the decision though the same was cited by learned counsel for the Revenue. 18. Similar is the view taken by the Delhi High Court in the case of National Projects Construction Corporation Ltd. v. CWT [1969] 74 ITR 465. It was therein held that the company engaged in the construction of dams and barrages was an industrial company. 19. In addition to the decision mentioned,

we have examined the natural meaning of the expression "industrial undertaking" given in Stroud's Judicial Dictionary, Volume 3, IV Edition, at page 1357. Following is the judicial meaning of the expression "industry". "INDUSTRY. - (1) 'Promotion of Industry and Commerce' (Town and Country Planning Act, 1947 (10 and 11 Geo. 6, C. 51) s. 85) : See Crystal Palace Trustees v. Minister of Town and Country Planning, 66 ILR (Pt.2), 753. (2) (Australia : Commonwealth Conciliation and Arbitration Act, 1901-1947. S. 13) 'industry' included ship painters and dockers, see R. V. Galvin, 23 ALJ 20. (3) An undertaking, although not carried on for profit, could be an 'industry' within the meaning of s.18 of the Industrial Arbitration Act, 1941 (N.S.W.) (Re Independent Schools and Colleges Domestic Staff [1963] AR (N.S.W.) 904). (4) Fire-fighting has been held to be an 'industry' within the meaning of s. 96(1) of the Industrial Arbitration Act. 1940-1968 (N.S.W.) Steward v. Board of Fire Commissioners (N.S.W.) [1970] LB Co's Indus. Arb. Serv., Current Review, p. 32), but not an 'industry' within the meaning of s. 132 (1)(b) of the Conciliation and Arbitration Act, 1904-1969 (6th) (Pitfield v. Franki [1970] 44 ALJR). (5) The process of destroying garbage by incineration was not an 'industry' within clause 3 of the Country Cumberland Planning Scheme Ordinance (Wollahra Municipal Counsel v. Sydney City Council [1966] 12 L.G.R.A. Stat. Def. Industrial Reorganisation Corporation Act, 1966 (C. 50) S. 22(7); Industrial Relations Act, 1972 (C. 72), s. 167". 20. Therefore, when a taxing statute has to be construed even when two) views are possible, the view that favours the assessee who hears the burden of tax should be favoured by the court. 21. Assuming that any other interpretation is possible for the expression "industrial undertaking" occurring in section 32A(2)(b)(iii) of the Act (which is doubtful). It is unexceptionable that the activities carried on by the assessee in these cases were certainly those of an industrial undertaking and as such were entitled to the allowance. 22. In the result, we answer the question we have reformulated in the affirmative and in favour of the assessee and set aside the order of the Tribunal in Income-tax Reference Cases Nos. 138, 139, 217 and 218 of 1985 and affirm the order of the Tribunal in Income-tax Reference Case No. 27 of 1986. 23. No order as to costs.