The Indian Hotels Company Ltd. & Others vs The Income Tax Officer, Mumbai & Others on 8 August, 2000

Equivalent citations: AIR 2000 SUPREME COURT 2645, 2000 (7) SCC 39, 2000 AIR SCW 2807, 2000 TAX. L. R. 874, 2001 (3) LRI 985, (2000) 112 TAXMAN 46, 2000 (8) SRJ 317, (2000) 9 JT 139 (SC), 2000 (5) SCALE 475, 2000 (9) JT 139, (2000) 158 TAXATION 212, (2000) 245 ITR 538, (2000) 5 SUPREME 397, (2000) 5 SCALE 475, (2000) 162 CURTAXREP 310

Bench: M.B.Shah, S.P.Bharucha, Ruma Pal

PETITIONER:
THE INDIAN HOTELS COMPANY LTD. & OTHERS

Vs.

RESPONDENT:
THE INCOME TAX OFFICER, MUMBAI & OTHERS

DATE OF JUDGMENT: 08/08/2000

BENCH:
M.B.Shah, S.P.Bharucha, Ruma Pal

JUDGMENT:

Shah, J.

T.C.Nos. 20 to 24 of 1989:

Under Article 139A of the Constitution, the appeals which were pending before the Income Tax Appellate Tribunal were transferred to this Court and numbered as Transferred Cases No.20-24 of 1989. Transferred Cases No.20-21 and 24 of 1989 are filed by assessee - the Indian Hotels Co. Ltd. and others, which pertain to the Assessment Years 1977-78, 1978-79 and 1976-77 respectively. Transferred Cases No.22 and 23 of 1989 are filed by the Revenue and pertain to Assessment Years 1977-78 and 1978-79. At the outset, we may point out that at the time of hearing of these cases, learned counsel for the parties confined their submissions to the Flight Kitchen operated by the assessee - Indian Hotels. Hence, other contentions raised in these cases are not required to be dealt with.

In the appeals, the Commissioner of Income Tax (Appeals) accepted the contention of the assessee that Taj Flight Kitchen cannot be considered as a hotel as it is a separate industrial undertaking which is engaged in the production of food packages on a large organized and mechanized basis for the use of various international airlines. After considering the contention, he arrived at the conclusion that the Flight Kitchen of the appellant was engaged in the manufacture or production of articles within the meaning of Section 80J(4)(iii) of the Income Tax Act, 1961 (hereinafter referred to as the Act) and it was not part of the hotel activity of the assessee. Hence, it would not come within the purview of section 80J(6) which provides for approval by the Central Government. He, therefore, directed the ITO to allow deductions under section 80J in respect of the capital employed in the Flight Kitchen.

It is the contention of Dr. Gouri Shanker, learned Senior Counsel for the assessee that the activity pertaining to the Flight Kitchen is not a hotel activity. The Flight Kitchen is a separate industrial undertaking which is engaged in manufacture or production of food packages on a large organised and mechanized basis for the use of various international airlines and, therefore, is entitled to get the benefit of Section 80J of the Act. As against this, learned Solicitor General Mr. Salve, on behalf of the revenue submitted that the activity of Flight Kitchen carried on by the assessee is part of the hotel business and for getting the benefit of Section 80J(1), it is required to obtain approval as provided under Section 80J (6)(d) of the Act.

In this appeal, M/s Hotel & Allied Traders Pvt. Ltd.-the assessee sought benefit of investment allowance under Section 32A of the Act for the assessment year 1978-79 by contending that assessee-company was an industrial undertaking engaged in manufacturing activity. That claim was finally rejected by the Tribunal by holding that assessee cannot be considered to be an industrial company engaged in manufacturing or processing of articles and hence was not entitled to get benefit under Section 32A of the Act. Further the Tribunal relied upon the decision in C.I.T., Kerala v. Casino Pvt. Ltd. [1973 (91) ITR 289] of the High Court. Against that order petition under section 256(2) of the Act was filed before the High Court of Kerala which was rejected by order dated 7.1.1985. That order is challenged in this appeal.

Leave granted.

In this appeal also, the assessee Hotel Shashi Private Ltd., a company engaged in the business of running a hotel named the Valley View Resort situated at Mahableshwar, claimed the benefit of investment allowance under Section 32A of the Act. Finally, that claim was rejected by the Tribunal. The application for reference by the Tribunal was also rejected as the issue involved was covered by the decision of the Bombay High Court in Fariyas Hotels Pvt. Ltd. v. Commissioner of Income Tax, [1995 (211) ITR 390]. For the said reason, the Bombay High Court also rejected the reference application vide its order dated 3.9.1997. That order is challenged in this appeal.

Relevant parts of the provisions that are required to be considered:

For appreciating the contentions raised by the learned counsel for the parties, we would first refer to the relevant provisions of the Act.

Section 80: Deductions to be made in computing total income. Section 80J: Deduction in respect of profits and gains from newly established industrial undertakings or ships or hotel business in certain cases.

80J.(1) Where the gross total income of an assessee includes any profits and gains derived from an industrial undertaking or a ship or the business of a hotel, to which this section applies, there shall, in accordance with and subject to the provisions of this section, be allowed, in computing the total income of the assessee, a deduction from such profits and gains reduced by the deduction, if any, admissible to the assessee under section 80HH or section 80HHA of so much of the amount thereof as does not exceed the amount calculated at the rate of six per cent per annum on the capital employed in the industrial undertaking or ship or business of the hotel, as the case may be, computed in the prescribed manner in respect of the previous year relevant to the assessment year (the amount calculated as aforesaid being hereafter, in this section, referred to as the relevant amount of capital employed during the previous year) :

Provided that in relation to the profits and gains derived by an assessee, being a company, from an industrial undertaking which begins to manufacture or produce articles or to operate its cold storage plant or plants after the 31st day of March, 1976, or from a ship which is first brought into use after that date, or from the business of a hotel which starts functioning after that date, the provisions of this sub-section shall have effect as if for the words six per cent, the words seven and a half per cent had been substituted.

80J(4) : This section applies to any industrial undertaking which fulfils all the following conditions, namely:

(i) . (ii) . (iii) It manufactures or produces articles, or operates one or more cold storage plant or plants, in any part of India, and has begun or begins to manufacture or produce articles or to operate such plant or plants, at any time within the period of thirty-three years next following the Ist day of April, 1948, or such further period as the Central Government may, by notification in the Official Gazette, specify with reference to any particular industrial undertaking;

80J(6) : This section applies to the business of any hotel, where all the following conditions are fulfilled, namely:

(a) . (b) . (c) . (d) The hotel is for the time being approved for the purposes of this sub-section by the Central Government;"

The relevant part of Section 32A of the Act which grants investment allowance reads thus: - 32A. (1). In respect of a ship or an aircraft or machinery or plant specified in sub-section (2), which is owned by the assessee and is wholly used for the purposes of the business carried on by him, there shall, in accordance with and subject to the provisions of this section, be allowed a deduction, in respect of the previous year in which the ship or aircraft was acquired or the machinery or plant was installed or, if the ship, aircraft, machinery or plant is first put to use in the immediately succeeding previous year, then, in respect of that previous year, of a sum by way of investment allowance equal to twenty-five per cent of the actual cost of the ship, aircraft, machinery or plant to the assessee:

Provided that no deduction shall be allowed under this Section in respect of

(a) any machinery or plant installed in any office premises or any residential accommodation, including any accommodation in the nature of a guest house;

(b) any office appliances or road transport vehicles;

(c) any ship, machinery or plant in respect of which the deduction by way of development rebate is allowable under section 33; and

(d) any machinery or plant, the whole of the actual cost of which is allowed as a deduction (whether by way of depreciation or otherwise) in computing the income chargeable under the head Profits and gains of business or profession of any one previous year.

(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 business of generation or distribution of electricity or any other form of power; or

(ii) in a small-scale industrial undertaking for the purposes 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 production of any article or thing, not being an article or thing specified in the list in the Eleventh Schedule.

(Emphasis supplied) Chapter II of the Finance Act, 1979 provides for rates of income tax. Relevant part dealing with the Company is as under: - 2(7) For the purposes of this section and the First Schedule. (a) (b) (c) 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.

The aforesaid definition covers four categories of the activities carried on by a company and it must be mainly engaged: -

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

(ii) in the construction of ships; (iii) in manufacturing or processing of goods; and (iv) in mining.

The explanation further provides that a company shall be deemed to be mainly engaged in the aforesaid activities if the income attributed to any one or more of the aforesaid activities in its total income of previous year is not less than fifty-one percent of such total income.

Section 80J quoted above provides for grant of deductions to an assessee who derives income from an industrial undertaking or a ship or the business of a hotel to which the Section applies and the Section applies to any industrial undertaking, any ship or business of any hotel if conditions prescribed under sub-section (4), (5) and (6) respectively are satisfied. The question would bewhether the assessee has derived profits and gains from an industrial undertaking or from the business of a hotel. Industrial undertaking is not given any meaning under the Act, hence it is to be understood as per common parlance language. Taking this into account, apparently, the business of the assessee is that of a hotel, which is a trading activity and not that of an industrial undertaking. The assessee - Indian Hotels Company Ltd. is having business of a hotel or chain of hotels and is not an industrial undertaking as understood in common parlance language. Even before the Commissioner of Appeals, it was contended by the assessee that Flight Kitchen is essentially ancillary unit. This would mean that operation of flight kitchen was ancillary to its business of hotel. Hence, result would be it is a company engaged in the business of hotel and not of industrial undertaking. Hence, for getting the benefit of Section 80J(1) it must fulfil the conditions laid down in sub-section (6).

The next question would beWhether under the aforesaid provisions it can be held that assessees hotels manufacture or produce foodstuffs?

From the reasoning of the Appellate Commissioner, it appears that he arrived at the conclusion that Taj Flight Kitchen was an industrial undertaking which is engaged in the production of food packages and in manufacture of food packages on a large scale in an organized and mechanized manner with sophisticated and modern techniques. Its dominant purpose is manufacture of food

cover for sale to the airlines and no retail sale in the premises of the flight kitchen is involved. He, therefore, held that the Flight Kitchen of the assessee is engaged in the manufacture or production of articles within the meaning of section 80J(4)(iii) of the Act.

In the Civil appeals filed by M/s Hotel & Allied Products (P) Ltd. and Hotel Shashi Pvt. Ltd., learned counsel Mr. Choudhary submitted that manufacturing and processing of goods includes the activity of preparing articles of food from raw materials entitling the Company to get deduction of investment allowance as provided under section 32A of the Act. It has been contended that the appellant-assessee satisfies the requirement of industrial Company as defined under section 2(7)(c) of the Finance Act, 1979. He submitted that hotel which inter alia converts raw materials into food stuffs is an industrial Company within the meaning of Section 2(7)(c) of the Finance Act and, therefore, it is entitled to get the benefit of section 32A.

From the Sections quoted above, i.e. Sections 80J(1) proviso, 80(J)(4), 80(J)(6), and Section 32A, for getting benefit of deduction or investment allowance, the requirement is assesseecompany must be engaged in the business of manufacture or production of any article or thing. In case of preparing food packages or selling the same or preparing foodstuffs for serving in the hotel there is no question of manufacture or production. The raw material is at the most processed so as to make it eatable. The word manufacture has various shades of meaning but unless defined under the Act it is to be interpreted in the context of the object and the language used in the Sections. In the context of the provisions which deal with grant of investment rebate or deduction under section 80J it is apparent that it is used to mean production of a new article or bringing into existence some new commodity by an industrial undertaking. It would not be applicable in cases where only processing activity is carried out. Further, such production activity must be by an industrial undertaking and not by the assessee having mainly trading activity. In C.I.T. Orissa and Others v. M/s N.C. Budharaja and Company and Others [1994 Supp (1) SCC 280], this Court considered the provisions of section 32A and Section 80HH(2) of the Act and held that machinery or plant for the purpose of business of construction, manufacture or production of any article or thing would not cover machinery employed in digging bore wells. The Court also considered the IXth Schedule (applicable at the relevant time) which contained item No.15 therein relating to ships and observed that the appropriate word in the case of ships is construction and in common parlance one speaks of construction of ships and not manufacture of ships. The Court held that, in this background, it is not possible or permissible to read the word construction as referring to construction of dams, bridges, buildings, roads or canals. The Court also observed that the association of words in former sub-clause (ii) and the present sub-clause (iii) is also not without significance and a statute cannot always be construed with the dictionary in one hand and the statute in the other; regard must also be had to the scheme, context and to the legislative history of the provision. Similarly, in case of a hotel business there is no question of manufacturing or producing pulses, wheat, rice, meat or such other items but what is done isfrom such raw materials eatable food stuff is prepared.

In support of his contention, learned Solicitor General referred to the decision of this Court in M/s Sterling Foods, A Partnership Firm v. State of Karnataka and Another [(1986) 3 SCC 469]. The Court in that case considered the question as to what happens when shrimps, prawns and lobsters purchased by the assessee (under the provisions of the Central Sales Tax Act, 1956) are subjected to

the process of cutting heads and tails, peeling, deveining, cleaning and freezing before export. Do they cease to be original commodity and become commercially a new commodity or do they still retain their original identity as shrimps, prawns and lobsters? The Court held that despite such processing they continue to possess their original character and identity and even though processing was necessary for making them fit for the table. The Court referred to the decision of the Supreme Court of the United States in East Texas Motor Freight Lines v. Frozen Food Express [100 L.Ed. 917] where the question was whether dressed and frozen chicken was a commercially distinct article from the original chicken. The Court relied upon the following passage from the said judgment: there is hardly less difference between cotton in the field and cotton at the gin or in the bale or between cottonseed in the field and cottonseed at the gin, than between a chicken in the pen and one that is dressed. The ginned and baled cotton and the cottonseed, as well as the dressed chicken, have gone through a processing stage. But neither has been manufactured in the normal sense of the word.

In our view, same would be the position with regard to the food stuff served or sold by the Hotels. The foodstuff prepared by cooking or by any other process from raw materials such as cereals, pulses, vegetables meat or the like cannot be regarded as commercially distinct commodity and it cannot be held that such foodstuff is manufactured or produced.

Further, the Legislature has differentiated industrial undertaking and trading activity of the assessee who deals in business of hotel by making different provisions. The business of hotel and that of industrial undertaking is considered to be distinct and separate for the purpose of grant of investment allowance under Section 32A or for grant of deduction under Section 80J. Under proviso (c) to Section 32A deduction of investment allowance is not to be made if in respect of any ship, machinery or plant to which the deduction of development rebate is allowable under Section 33. For the machinery and plant installed by an assessee being an Indian company in premises used by it as a hotel, specific provision for grant of deduction of development rebate is made under Section 33(1)(b)(B)(ii). Similarly, under Section 80J for a business of hotel and industrial undertaking separate provisions are prescribed making Section applicable namely sub-sections (4) and (6). Conditions which are required to be satisfied by such assessees are different. Therefore, an assessee who is carrying on a trading activity of business of a hotel cannot claim the benefit granted to an industrial undertaking by contending that it also produces foodstuff or food packets.

In support of his contentions, learned counsel Mr. Choudhary referred to the decision of the Gauhati High Court in Commissioner of Income-Tax v. Hotel Belle Vue (P.) Ltd., [1997 (223) ITR 675]. In that case the assessee who was running a hotel, installed machinery and plant in hotel premises and claimed investment allowance in respect of it by contending that food- stuff was produced by it. The claim was rejected by the Assessing Officer but was allowed by the Tribunal and on reference the High Court held that assessees hotel was an industrial undertaking within the meaning of sub-clauses (ii) and (iii) of sub-section (2) of Section 32A and was entitled to investment allowance. The Court held that the word manufacture has not been defined in the Finance Act and in its ordinary meaning manufacture is a process by which an alteration or change takes place in the goods which are subjected to such manufacture and brought about a commercially new article in the market; when food is prepared from raw materials, definitely a new product is prepared or made, which is known as a different item and the said item cannot be brought back to its original form. The Court

observed, therefore, when food is prepared or processed, it must be taken as manufacturing process. In our view, the aforesaid reasoning is on the face of it, erroneous as discussed above. By processing of raw food, it cannot be said that it results in manufacture or production of new articles. What is done is raw food is processed for the purpose of consumption. Further, it appears that the High Court has mixed up the words manufacture and process as section 32A of the Act provides for business of manufacture or production of goods and not for manufacture or processing of goods.

As against the aforesaid decisions, it has been pointed out that some other High Courts have taken the view that (i) a hotel is merely a trading concern; and (ii) the activity carried on for preparing food articles from raw materials in a hotel would not constitute manufacture or production of goods. In C.I.T., Kerala v. Casino (Pvt.) Ltd., [1973 (91) ITR 289], Division Bench of the Kerala High Court referred to Section 2(6)(d) of the Finance Act, 1968 which defines an industrial company and held that the activity carried on by the assessee in preparing articles of food from raw materials would not constitute manufacture or processing of goods within the meaning of said Section. Foodstuffs prepared in the hotels using raw materials such as pulses, wheat, vegetables or meat and the like cannot be said to be manufacturing activity and such activity was trading activity. The Bombay High Court also took the similar view in Commissioner of Income- Tax v. Berrys Hotels Pvt. Ltd., [1994 (207) ITR 615] and held that benefit of Section 2(7)(c) of Finance Act, 1973 can be given to manufacturing concerns and not to trading concerns. In Fariyas Hotels Pvt. Ltd. v. Commissioner of Income Tax, [1995 (211) ITR 390], it held that investment allowance under Section 32A is not available in respect of machinery installed for the purpose of business of the assessee which is engaged in the business of running a hotel as it is essentially a trading activity. Similarly the Calcutta High Court in C.I.T. v. S.P. Jaiswal Estates (P) Ltd., [1992 (196) ITR 179], held that an assessee who claims investment allowance under Section 32A of the Act has to be (1) an industrial undertaking carrying on the business of manufacturing or producing any article or thing, therefore, the business itself has to be that of manufacture or production; (2) the processing of an article or thing is outside the scope of this provision; and (3) the business of a hotel is essentially a non- manufacturing or non-producing or even non-processing concern and is a trading concern. The Court observed that even if the incidental activity of processing food materials into edible products for service to clients in the restaurant is a necessary adjunct of the hotel business and is ultimate nature of the business of hotel-keeping, it is a trading activity. It cannot be held to be a business of manufacture or production of any article or thing.

In the result, Transferred Cases No.22 and 23 of 1989 filed by the Revenue are allowed and it is held that the Flight Kitchen operated by the assessee-Indian Hotels Company Ltd. is not entitled to get the benefit of Section 80J. Transferred Cases No.20, 21 and 24 of 1989 filed by the assessee-Indian Hotels Company Ltd. are dismissed. Civil Appeal No.1774 of 1992 and Civil Appeal No._____of 2000 @ S.L.P.(c) No. 324 of 1997 filed by M/s Hotel & Allied Traders Pvt. Ltd. and Hotel Shashi Private Ltd. respectively are also dismissed. There shall be no order as to costs.