Burmah Shell Oil Storage & Distributing ... vs C.I.T on 6 April, 1994

Equivalent citations: 1994 SCC, SUPL. (2) 239 JT 1994 (3) 162, AIRONLINE 1994 SC 733

Author: G.N. Ray

Bench: G.N. Ray

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           PETITIONER:
BURMAH SHELL OIL STORAGE & DISTRIBUTING CO. OF INDIA LTD.

        Vs.

RESPONDENT:
C.I.T.

DATE OF JUDGMENT06/04/1994

BENCH:
RAY, G.N. (J)
BENCH:
RAY, G.N. (J)
VENKATACHALLIAH, M.N.(CJ)

CITATION:
 1994 SCC  Supl.  (2) 239 JT 1994 (3)   162
 1994 SCALE  (2)481


ACT:



HEADNOTE:



JUDGMENT:
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The Judgment of the Court was delivered by G.N. RAY, J.- This is an appeal on a certificate granted by the High Court at Calcutta under Section 261 of the Income Tax Act, 1961, against the judgment and order of the said High Court dated June 8, 1977 in Income Tax Reference No. 336 of 1970.

2. The Burmah Shell Oil Storage and Distribution Company of India Ltd. (now known as Bharat Petroleum Corporation Ltd.) hereinafter referred to as the appellant-Company, was engaged in the

business of distributing liquid petroleum gas manufactured by the Burmah Shell Refineries Limited (hereinafter referred to as the Refinery). For the purpose of such distribution, the appellant-Company had from the year 1955 to the beginning of 1961, which was its previous year for the assessment year 1962-63 acquired iron cylinders at a total cost of Rs 1,09,63,754. Those cylinders were used as 'returnable packages'. They were accounted by the appellant-Company as its capital assets but no allowance for depreciation thereon was claimed or allowed in any of its assessment up to the year 1961-62. The said cylinders were used to be filled with the gas by the Refinery. The Refinery later on offered to purchase the cylinders owned by the appellant-Company. The sale of cylinders took place in 1961 for a total sum of Rs 82,19,947 as against their original cost of Rs 1,09,63,754. There was thus a shortfall of Rs 27,43,807 which the appellant Company claimed as a deduction in the assessment year 1962-63.

3. By an assessment order, the Income Tax Officer Central Circle V, disallowed the said claim. The Income Tax Officer rejected the contention of the appellant-Company that the loss on the sale of cylinders should be allowed as loss on 'returnable packages' by observing that under Rule 5, the cost of returnable packages was to be allowed as revenue expenditure when 'actually used up' and the same implied that the packages must have been rendered unused by wear and tear and must have been consumed. The Income Tax Officer held that the said rule had no application where packages were disposed of in good condition by sale. The said officer further observed that the loss would also not arise under Section 32(1)(iii) of the Income Tax Act, 1961, as the terminal loss applied only to assets on which depreciation allowances had been granted.

4. The appellant-Company filed an appeal before the appellate Assistant Commissioner of Income Tax being Appeal No. 26 CC.V of 1963-64 which was dismissed. On further appeal, the Income Tax Appellate Tribunal, however, was pleased to allow the appeal holding inter alia that the said cylinders were ,returnable packages' and the loss of Rs 27,43,807 on account of disposal of cylinders was a loss allowable as revenue expenditure within the meaning of Rule 5. The claim under Section 32(1)(iii) of the Income Tax Act was not allowed on the finding that the appellant-Company's contention on that score did not survive.

5. Thereafter, the Commissioner of Income Tax made an application to the Income Tax Appellate Tribunal requiring it to draw up a statement of the case referring the following two questions for the opinion of the High Court at Calcutta :

> (a) Whether on the facts and in the circumstances of the case,the Tribunal was right in holding that the sum of Rs 27,43,807 being the difference between the cost of gas cylinders purchased by the assessee and their sale value was allowable as a revenue expenditure under Rule 5 of the Income Tax Rules, 1962, read with the 'Remarks' against the entry relating to returnable packages in the statement of rates contained in Part 1 of Appendix 1 to the said Rules?
>
> (b) Whether on the facts and in the circumstances of the case the Tribunal was right in holding that the Company could make up the shortfall in the statutory reserve for the year under consideration by falling back on the excess reserves created in the

> earlier years and that the said excess reserves should be taken into account in determining the quantum of the statutory development rebate reserve required to be made in any subsequent year and in allowing the full development rebate of Rs 24,15,622 although the actual reserve fell short of the statutory requirement?

6. The appellant-Company opposed the said application and in reply it was pointed out that at the hearing of appeal by the Tribunal, it had alternatively been argued that the claim for the allowance of Rs 27,43,807 should be admitted as depreciation under Section 32(1)(iii) of the Income Tax Act, 1961. The appellant-Company, therefore, submitted that if the Tribunal would decide to make the reference, the question should be in terms suggested by it.

7. After hearing the parties, the Tribunal finalised the statement of the case and referred the following questions for the opinion of the High Court of Calcutta :

> (1) Whether, on the facts and in the circumstances of the case, the loss of Rs 27,43,807 arising on the sale of gas cylinders was allowable as a revenue expenditure as provided for in the remarks against 'Returnable Packages' under the classification 'Mineral Oil Concerns' in item M(2)(2)(d) under the heading (iii) 'special rates to be applied to other machinery and plant' in Part 1n of Appendix 1 to Rule 5 of the Income Tax Rules, 1962 or under Section 32(1)(iii) of the Act?
>
> (2) Whether, on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in holding that the shortfall in the statutory provision for development rebate reserve created by the Company for the year under consideration could be made up by the excess provisions for development rebate reserve created in the earlier years and that the full amount of development rebate of Rs 24,15,622 could be allowed in that year on the basis of such adjustment?

8. Such reference was registered before the High Court as Reference No. 336 of 1970. After a contested hearing, the High Court while delivering the judgment reframed the first part of Question No. 1 which reads as follows :

> "Whether, on the facts and in the circumstances of the case, Rs 27,43,807 (realised by the assessee on sale of the cylinders) was allowable as revenue expenditure under Rule 5 of the Income Tax Rules, 1962 read with item M(2)(2)(d)(i) of ... Part 1 of Appendix 1 to the said Rules?"

and answered this part of the question in the negative and in favour of the Revenue. The High Court also held that the question of law under Section 32(1)(iii) of the Income Tax Act was an independent question of law and the Tribunal not having dealt with must be deemed to have decided against the appellant-Company. The High Court answered the second part of the Question No. 1 in the negative and in favour of the Revenue and it reframed Question No. 2 as follows:

> "Whether, on the facts and in the circumstances of the case, the Tribunal was right in allowing the development rebate of Rs 24,15,622 although there was a shortfall of Rs 34,827 in the development rebate reserve account created by the assessee in the accounting year?"

9. The High Court answered Question No. 2 reframed in the negative and in favour of the Revenue. The High Court at Calcutta, however, was pleased to allow the application of the appellant-Company to appeal to this Court under Section 261 of the Income Tax Act, 1961 and the certificate of appeal was granted limited to the following questions of law :

> (a) Whether the general provision of Section 32(1)(iii) of tile Income Tax Act, 1961 applies to machinery and plant specially listed in Section III (iii) of the statement in Part 1 of Appendix 1 to the Income Tax Rules, 1962.
>
> (b) Whether there can be any written down value of returnable packages specified in item M(2)(2)(d)(i) in the said section of the said statement.
>
> (c) Whether the interpretation by the learned Judges of the expression 'cost of packages' and 'actually used up' appearing in the remarks against the said item is correct.
>
> (d) Whether in deciding the question if the deduction referred to in Section 33 of the Income Tax Act, 1961 may be allowed in any year the amount credited to the reserve account in past years in excess of the requirement prescribed by Section 34(3)(a) may be taken into account.

10. Mr S. Rajappa, the learned counsel appearing for the appellant Company contended that Section 32(1)(iii) of the Income Tax Act, 1961 applies to the machinery and plant specially listed in Part 1 of the Appendix to Income Tax Rules, 1962 and the High Court had gone wrong in holding that the said general provision of Section 32(1)(iii) of Income Tax Act, 1961 was not applicable in the facts and circumstances of the case. It has been contended by Mr Rajappa that admittedly the cost of cylinders was Rs 1,09,63,754 and as no depreciation was allowable on those returnable packages, the written down value of the cylinders must be held to be Rs 1,09,63,754. Since the cylinders were sold for Rs 82,19,947 the deficiency of Rs 27,43,807 is allowable under Section 32(1)(iii). Such contention was also raised before the High Court but the same was rejected by the High Court by indicating that quantum of written down value being a pure question of fact and in the absence of any finding of the Tribunal as to the written down value of the cylinders such contention could not be considered within the scope and ambit of Question No. 1. The High Court has also held that even if it was assumed that the written down value of the cylinders was Rs 1,09,63,754 the claim of the appellant-Company could not be allowed because the Company had not written off Rs 27,43,807 in its books of account.

11. Mr Rajappa also urged that the High Court had gone wrong in not accepting the development rebate for Rs 24,15,622 since allowed by the Tribunal in answering the reference. In this context, Mr

Rajappa has reiterated the contentions made before the High Court. It transpires that there was shortfall in the development reserve account in the accounting year. But the appellant-Company did not debit the excess amount of the earlier years in the profit and loss account of the accounting year in question. The appellant-Company also did not credit the said excess amount to the development reserve account of this accounting year to make up the said deficiency. The High Court has not accepted the submission of the appellant-Company that Section 34(3)(a) was not inflexible and in appropriate cases, such provision was relaxable and the shortfall of a small amount arising due to genuine mistake of the appellant-Company should not stand in the way of relaxing the provision of Section 34(3)(a) of the Income Tax Act. The High Court has referred to a decision of this Court in Indian Overseas Bank Ltd. v. CIT1 to the effect that development rebate is "a concession granted but that concession is made subject to fulfilment of certain requirements" and "entries in the account books required by the proviso are not idle formality". It has been indicated by the High Court that decision in Indian Overseas Bank Ltd. v. CIT1 was concerned with proviso (b) to Section 10(2)(vi-

b) of the Income Tax Act, 1922 which is in pari materia with Section 34(3)(a) of Income Tax Act, 1961. The High Court has held that (a) excess amount in the earlier years development rebate reserve account is not freezed by Section 34(3)(a) of the Act in view of its clear language; (b) the directors of a company are entitled to free the excess amount and after doing so, the company by debiting it in the profit and loss account and by crediting it to the development rebate reserve account can make up the shortfall of the accounting year in which the development rebate is actually claimed or allowed and (c) except in these cases in which the Central Board of Revenue or the Central Board of Direct Taxes have relaxed the provisions of Section 34(3)(a) it must be complied with in order to earn the development rebate claimed in a particular year. The High Court has held that the appellant-Company did not transfer the excess amounts of the earlier years in the accounting year for the purpose of making up the corresponding reserve and it is an admitted fact that the appellant-Company did not comply with the provisions of Section 34(3)(a) of the Act.

12. Mr Rajappa has next urged that so far as the appellant- Company is concerned, the said cylinders must be held to be "actually used up". The question as to whether or not the packages are "actually used up" needs to be determined not in abstract term but with reference to the actual usefulness to the assessee. Mr Rajappa has also contended that the expression "actually used up"

> (1970) 2 SCC 4 : (1970) 77 ITR 512 in item M(2)(2)(d)(i) of Part 1 of the Depreciation Schedule Appendix 1 of Rule 5 of the Income Tax Rules, 1962 includes both total and partial 'use up'. Mr Rajappa has submitted after the sale of the cylinders to the Refinery, the cylinders did not belong to the appellant-Company and they lost their usefulness to the appellant-Company and it is immaterial if the very same cylinders were used by the Refinery to fill up with gases and sending the same to the appellant-Company for distribution to the consumers. It may be noted that similar contentions were also made before the High Court but the same were rejected by holding inter alia that expression "used up" means "exhausted by use, rendered unserviceable". In view of the expression "actually used up", the case of "partial use up" was not acceptable. The High Court has also held that the words "actually used up"

qualifies the word "packages". Hence the expression is not required to be interpreted with reference to the user by the assessee. It has been indicated by the High Court that the cylinders in fact, after the sale, were put to use by the Refinery and such cylinders filled up with gas were sent to the appellant-Company which in its turn distributed the same to the consumers. Since the cylinders were actually used up in the trade both by the Refinery and by the appellant- Company after the sale, it cannot be held that the cylinders were "actually used up". Hence, the claim for deduction of Rs 27,43,807 as a revenue expenditure under Rule 5 of the Income Tax Rules, 1962 read with item M(2)(2)(d)(i) of Part 1 of Appendix 1 to the rules was inadmissible and reference on this question must be answered against the assessee.

13.Mr J. Ramamurti learned Senior Advocate appearing for the respondent has submitted that the Appellate Tribunal has found as a fact that the gas cylinders are returnable packages. Hence, the schedule entry M(2)(2)(d)(i) of Appendix 1 is applicable. Such schedule refers only to cost and not loss. As the cylinders were not "actually used up"

> for reasons indicated by the High Court, the assessee was not entitled to any benefit of this entry. Mr Ramamurti has also urged that where entry M(2)(2)(d)(i) of Appendix 1 to the rules is applicable, Section 32(1)(iii) of the Income Tax Act does not apply. Even assuming that Section 32(1)(iii) applies, the Tribunal has not found any fact relating to written down value. Written down value being a question of fact must be found on consideration of relevant materials. The Tribunal has not dealt with this issue and the question therefore did not arise for consideration. Mr Ramamurti has also submitted that in any event, as rightly pointed out by the High Court, the assessee is not entitled to claim any benefit under Section 32(1)(iii) as the assessee has not written off the deficiency in its books of account. Such writing down is a condition which is required to be satisfied. Mr Ramamurti in this connection has referred to a decision of Madras High Court in S. Rajagopala Vandayar v. CIT2' which according to Mr Ramamurti has taken into consideration earlier decisions including the decision of this Court in CIT v. National Syndicate3 and Board's circulars. Mr Ramamurti has also submitted that amendment of Section 34(3)(a) regarding development rebate reserves being effective from April 1, 1962, the assessee's claim for such rebate was not at all entertainable. He has therefore, submitted that there is no occasion to 2 (1990) 184 ITR 450 3 41 ITR 225:(1961)2 SCR 229 interfere with the decision of the High Court and the appeal should be dismissed.

14. After giving our careful consideration to the matter, we approve the decision of the High Court which has already been indicated in some detail. In our view, the cylinders in question did not satisfy a case of returnable packages "actually used up". It also appears to us that the High Court has held, for good reasons, that the assessee could not claim any deduction under Section 32(1)(iii) of the Act and a claim on account of development reserve under Section 34(3)(a) of the Act was also inadmissible for the reasons indicated by the High Court. In the aforesaid circumstances, this appeal fails and is dismissed without, however, any order as to costs.