IN THE HIGH COURT OF BOMBAY

Income Tax Appeal No. 129 OF 2011

THE COMMISSIONER OF INCOME TAX-V, PUNE

Vs

FINOLEX CABLES LTD

D Y Chandrachud and M S Sanklecha, JJ

Dated: March 01, 2012

Appellant Rep by: Mr Vimal Gupta
Respondent Rep by: Mr S N Inamdar, Sr Adv with Mr Mihir Naniwadekar

JUDGEMENT

Per: D Y Chandrachud:

1. This is an appeal by the Revenue under Section 260A of the Income Tax Act, 1961 from an order of the Income Tax Appellate Tribunal dated 16 August 2007. The Appeal pertains to Assessment Year 199495. The questions of law raised by the Revenue, as reframed by the learned counsel are as follow:-

(1) Whether on the facts and circumstances of the case and in law the Tribunal was justified in not accepting the allocation of expenses made by the Assessing Officer to the Urse1 Unit, which was eligible for deduction u/s 80IB, even though the Assessing Officer had given detailed reasons to show that the allocation of expenses to the Urse1 Unit was kept proportionally low to increase the profit of the Urse1 Unit for the purpose of computation of deduction u/s 80IB?

(2) Whether on the facts and circumstances of the case and in law the Tribunal was justified in holding that the Urse UnitII was a separate identifiable integrated unit by itself even though the Annual Report of the Assessee Company mentions Urse II Unit as an expansion of the existing Urse 1 Unit?

(3) Whether on the facts and circumstances of the case and in law the Tribunal was justified in not allowing depreciation amounting to Rs.1,00,14,550/- on plant & machinery pertaining to the UrseII Unit to be adjusted against the profits of the Urse1 Unit for the purpose of computation of deduction u/s 80IB even though the UrseII Unit was merely an extension of the Urse1 Unit?

2. Leave is granted to the Revenue to amend the memo of appeal so as to incorporate the questions of law in terms of the draft tendered to the Court, which is marked "X" for identification.

3. Insofar as the first question is concerned, the order of the Tribunal indicates that the allocation of expenses made by the Assessing Officer to Urse UnitI was decided by the Tribunal in the case of the Assessee for Assessment Year 1993-94 in a decision dated 31

July 2007. The facts relating to the appeal for Assessment Year 1994-95, according to the Tribunal, were identical. Hence, in terms of the earlier decision, the Tribunal remitted back the entire issue with regard to the allocation of expenses to the file of the Commissioner of Income Tax (Appeals) who was directed to reexamine the issue having regard to the directions contained in a decision of the Tribunal for Assessment Year 1993-94.

4. Learned counsel appearing for the Revenue is not in a position to state before the Court that there is any factual distinction in regard to the Assessment Year in question in the present year or that the earlier decision of the Tribunal for Assessment Year 1993-94 has been challenged by the Revenue. In that view of the matter, we do not consider any substantial question of law would arise on the first question.

5. The Appeal is admitted on the second and third questions and by consent, is taken up for hearing and final disposal.

6. The Assessee set up UnitI at Urse during the previous year relevant to Assessment Year 1990-91. The deduction under Section 80I was allowed to that Unit from Assessment Year 1991-92. During the previous year relevant to Assessment Year 1994-95, the Assessee claimed to have set up a separate industrial undertaking at Urse, described as Unit-II. According to the Assessee, trialruns of the new unit were conducted in the previous year relevant to Assessment Year 1994-95 and the Unit began to manufacture the goods in the previous year relevant to Assessment Year 1995-96.

7. The Assessing Officer came to the conclusion that the Unit at Urse which was described as Unit-II was in fact an expansion of the existing unit, Unit-I. Consequently, the depreciation of UnitII at Urse, according to the Assessing Officer, was required to be considered for working out the profit of UnitI while computing the deduction under Section 80I.

8. In Appeal, the Commissioner of Income Tax (Appeals) accepted the claim of the Assessee by holding that (i) The Assessee had submitted a flow chart showing various stages involved in manufacturing of Jelly Filled Cables; and (ii) The Assessee had also filed details of investments made in the plant and machineries for the years ending 1994 and 1997. The Commissioner entered a finding of fact that the machinery, which was installed at the Unit which was described as Unit-II, is working independently and that a considerable amount has been spent to install ancillary machineries to increase production capacity there. The Commissioner held that the new Unit could be sustained as an independent viable unit by itself.

9. In Appeal, the Tribunal confirmed the decision of the Commissioner. The Tribunal noted that (i) The entire process of manufacturing including the stages and machineries required at each of the stages was explained to it; (ii) The Tribunal had scrutinized the details of the plant and machineries installed in order to bring into existence a new unit and the costs incurred for that purpose; (iii) The process chart showing different stages of manufacturing in the new Unit indicating material inputs and machineries required, was on record; (iv) The machineries installed in the new Unit from Assessment Year 1994-95 and thereafter as well as the value of machineries installed is on record; and (v) The Tribunal was apprised of the funds which were invested for the purposes of the new Unit. During Assessment Year 1994-95, an amount of Rs.7.44 crores was invested. After considering this record, the Tribunal held that a new Unit, called Urse Unit-II, was brought into existence during the previous year relevant to Assessment Year 1994-95 by investing substantial funds and by establishing a new plant and machineries. The Tribunal was of the view that Urse UnitII is a

separate identifiable Unit by itself wherein articles are produced. This finding of the Tribunal has been called into question in the present appeal.

10. Learned counsel appearing for the Revenue submitted that what has been described as UnitII was put up on the same plot of land adjacent to the existing Unit and produces the same goods, Jelly Filled Cables. No separate balance sheet is maintained. No separate licence has been obtained and a report of the Directors which was relied upon by the Assessing Officer showed that there was a substantial expansion of the existing unit.

11. On the other hand, it has been urged on behalf of the Assessee by learned Senior Counsel that it is not in dispute that UnitII at Urse constitutes a substantial expansion of the existing unit. Moreover, it has not been disputed that the Unit produces the same product as that in Unit-I. However, the submission is that this does not disable the Assessee from claiming the benefit of the deduction under the provisions of Section 80I as they stood so long as (i) The new unit is an independent integrated unit; (ii) The unit which has been newly established is capable of producing articles or goods by itself; (iii) There has been substantial investment of funds into the new unit; (iv) The new unit has not been formed by reconstruction of the existing business, but a new plant and machineries have been installed; and (v) There has been increase in production capacity as a result of the new unit. These requirements, according to the Assessee, have been fulfilled.

12. The issue which arises before the Court in the appeal is not resintegra. In *Textile Machinery Corporation Ltd. v/s Commissioner of Income Tax, West Bengal [1977] 107 ITR 195 (SC)*, the Supreme Court considered the ambit of the exemption that was available under the provisions of Section 15C(2) (i) of the Income Tax Act, 1922. The Supreme Court held that Section 15C had both a negative and a positive connotation. Negatively, a new industrial undertaking should not be formed either by splitting up or reconstruction of a business already in existence or transferring to a new business, the building, plant and machinery which was used in the business carried out earlier. Positively, a new industrial undertaking must produce a result. The five tests which have been laid down by the Supreme Court are as follows:-

"(1) investment of substantial fresh capital in the industrial undertaking set up;

(2) employment of requisite labour therein;

(3) manufacture or production of articles in the said undertaking;

(4) earning of profits clearly attributable to the said new undertaking; and

(5) above all, a separate and distinct identity of the industrial unit set up."

13 The following principles of law clearly emerge from the decision of the Supreme Court:-

(i) There must be a new undertaking where substantial investment of fresh capital is made in order to enable earning of profit attributable to that new capital;

(ii) The manufacturing or production of articles yielding additional profit attributable to a new outlay of capital in a separate and distinct unit is the heart of the matter;

(iii) The true test is not whether a new industrial undertaking connotes expansion of the existing business, but whether it is all the same a new and identifiable undertaking separate and distinct from the existing business;

(iv) If an undertaking can exist even after cessation of the principal business of the Assessee, it cannot but be a new and separate business or undertaking;

(v) There must be a new undertaking which constitutes an integrated unit by itself;

(vi) A new unit must be set up with new plant and machinery; and

(vii) The fact that a Unit produces the same commodity does not disentitle the Assessee to the benefit of the deduction.

14. On the same day, as the decision in Textile Machinery Corporation Ltd. (supra), the same Bench of the Supreme Court decided an appeal in *Commissioner of Income Tax, West Bengal v/s Indian Aluminum Co. Ltd. [1977] 108 ITR 367 (SC)*. The decision in Indian Aluminum (supra) is significant because in that case the Assessee, which had four manufacturing centres for manufacture of aluminum ingots, had during the course of the accounting year relevant to the Assessment Year made a fresh outlay of capital at one more centre besides which additional investments were made in the form of extension to the existing factory premises where a new plant and machinery was installed. The Tribunal held that as a result, the production of aluminum ingots doubled and that in view of the nature of the substantial investments it could not be said that the unit was not a new unit. These units were set up side by side with the old ones and added to the Assessee's total output. The Supreme Court followed its decision in Textile Machinery Corporation (supra) and dismissed the appeal of the Revenue. Indian Aluminum (supra), therefore, was a case where the claim of the Assessee was upheld on the basis of the substantial investments made by the Assessee, resulting in a significant increase in the capacity of production though the new unit was involved in the production of the same goods. The test was that a new unit was a separate industrial undertaking by itself.

15. In a decision of a Division Bench of this Court in *Commissioner of Income Tax v/s Associated Cement Companies Ltd. [1979] 118 ITR 406 (Bom)*, the Assessee had installed new kilns at each of its four factories. The Division Bench while allowing the claim of the Assessee under Section 15C of the Income Tax Act, 1922 held as follows:-

"There can be no doubt that the construction of each of the new kilns at each of the four factories has resulted in an expansion of the factory itself. That by itself would, however, not disentitle the assessee to the relief under S. 15C. Establishment of a new industrial unit as a part of an already existing industrial establishment may no doubt result in an expansion of the industry or the factory, but if the newly established unit is itself an integrated independent unit in which new plant and machinery is put up and is itself, independently of the old unit, capable of production of goods, then, in our view, it could be classified as a newly established industrial undertaking."

16. The facts on the basis of which this conclusion was arrived at were dealt with by the Division Bench in the following extract:

"The facts which we have referred to earlier clearly establish that the new kilns are a completely integrated unit which could be put into production independently of the other

units or production therefrom can cease without affecting the production from the other kilns. There is also no doubt that all these four kilns at the four different factories have been established with the plant and machinery newly purchased and required exclusively for the purposes of these new kilns. Thus, even though the business or the industrial establishment as a whole has been expanded by the addition of a new klin, each new kiln by itself would, in our view, clearly constitute a new industrial undertaking within the meaning of s.15C of the Indian I.T. Act, 1922."

17. In the present case, it is in this background that the decision of the Tribunal would have to be assessed. The order of the Assessing Officer in the present case takes note of the following facts:-

(i) The Assessee had constructed a building on existing land in which equipment was installed in the month of December, 1993;

(ii) Since trialruns were conducted during the year, no balancesheets or profit and loss account were prepared;

(iii) The Capacity of Urse UnitI had been expanded.

18. The Commissioner (Appeals) was apprised of the relevant facts pertaining to deployment of capital. The total deployment of capital in the Urse-II Unit upto Assessment Year 1996-97 was to the extent of Rs. 33.80 Crores including Rs.8.93 Crores upto Assessment Year 1994-95, being the year under consideration. This was juxtaposed with the initial capital outlay of Rs.12.71 Crores in UrseI Unit in 1990-91. The Commissioner noted the submission of the Assessee to the effect that Urse-II Unit, which was set up, resulted in an increase of installed capacity of Jelly Filled Cables by 60%. The Commissioner entered a finding of fact that there was investment in plant and machinery; that the machinery was working independently; and that having regard to the stages involved in manufacturing Jelly Filled Cables, the new Unit was an independent viable unit by itself.

19. The Tribunal has duly applied its mind to the evidence on record. The material on the record before the Tribunal and which has been considered in some detail is sufficient to sustain the finding of fact that: (i) There was a substantial investment of funds in the Unit which was set up in the previous year relevant to the Assessment Year 1994-95; (ii) New plant and machinery was installed; (iii) The Unit was housed in a new building constructed at site and was an independent viable Unit capable of producing goods manufactured by itself; and (iv) There was a substantial increase in the capacity of production. On these findings of fact which have not been shown to be perverse, the final conclusion of the Tribunal would not fall for reappreciation or reconsideration. Accordingly, we dispose of the Appeal by answering both questions of law in the affirmative. There shall be no order as to costs.