Orient Express Co. (P.) Ltd. Vs. Inspecting Assistant

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Court : Income Tax Appellate Tribunal ITAT Delhi

Decided On : Jul-26-1985

Reported in : (1985)14ITD506(Delhi)

Judge : G Krishnamurthy, S Mehra

Appellant : Orient Express Co. (P.) Ltd.

Respondent : inspecting Assistant

Judgement :

1. This appeal filed by the Orient Express Co. (P.) Ltd., New Delhi, a company engaged in the business of acting as travel agents, is running a hotel at Khaujraho known as Chandela. This hotel is said to be a five-star delux hotel. The controversy in this appeal centred round the claim made by the assessee for the allowance of investment allowance under Section 32A of the Income-tax Act, 1961 ('the Act') on the new plant and machinery installed by the assessee. We are in this appeal not concerned with the actual computation of the relief claimed except the principle involved. The IAC, who made the assessment, rejected the assessee's claim on the ground that the assessee was running a hotel which is a service industry and not an industrial undertaking engaged in the manufacture of any article and, therefore, did not qualify as an industrial undertaking for the purpose of allowing the investment allowance. The IAC relied on the decision of the Kerala High Court in the case of CIT v. Casino (P.) Ltd. [1973] 91 ITR 289. The Commissioner (Appeals) supported this view by not only relying upon the decision of the Kerala High Court but also on another decision of the Madras High Court in

the case of CIT v. Buharl Sons (P.) Ltd. [1983] 144 ITR 12 and the language used in Section 32A as contrasted with the language used in Section 80J of the Act. In his opinion when Section 80J provided for the allowance of relief on income derived from an industrial undertaking or the business of a hotel, Section 32A confined itself only to industrial undertaking, which meant that the Legislature deliberately excluded hotels from the purview of Section 32A presumably on the ground that hotel industry is not an industry engaged in the manufacture of any article . and that it was only a service industry or a trading concern not involving manufacture of any article. It is against this view of the Commissioner (Appeals) that the present appeal is filed by the assessee before us.

2. Elaborate arguments were addressed to us both for and against this view. The views canvassed in favour of the assessee's contentions were (a) mis-reading and misapplication of the Kerala High Court judgment as well as the Madras High Court judgment, (6) improper appreciation of Section 32A more particularly that portion of Section 32A which dealt with the type of machinery used for the purpose of business of manufacture or production of any article or thing, (c) the observations made by the Madras High Court in the case of CIT v. Engine Valves Ltd. [1980] 126 ITR 347 where the Madras High Court while allowing higher rate of depreciation on factory buildings took into consideration the question that a canteen where cooking and other preparations are carried on can be regarded in the strictest sense of the term as a place where the manufacture was carried on although in normal parlance the process of cooking is not referred to as a process of manufacture, and (d) that the Tribunal, Cochin Bench held in the case of ITO v.Elite Sea Foods [1983] 3 ITD 348 that an assessee, who purchased shrimps and exported them after subjecting them to certain processes is an assessee engaged in the production of an article and, therefore, is entitled to investment allowance in respect of the machinery used in carrying out those processes. In this context another decision given by the Tribunal, Hyderabad Bench, in the case of Progressive Engg. Co. v.ITO [1983] 3 ITD 172 was also pressed into service to show that in the case of a contractor construction of a dam would also come within the meaning of Section 32A entitling the assessee-contractor for the investment allowance. The argument was that when export of shrimps after processing was held to be production, the construction of a dam was held to be an industrial

undertaking, there is no reason why the hotel which caters to the human needs should not also be held to be an industrial undertaking engaged in the production of articles and things, which satisfies the human beings. Besides a lot of material was placed in our hands to show that hotels were being regarded as industries both by the Centre and State Governments and several concessions envisaged in the Industrial Policy Resolution, 1980, were being extended to hotels. Tourism was treated as an industry and the tourism is considered among the highest foreign exchange earning industry in the country. Its growth would depend only upon the successful running of the hotel industry and hotel industry could not, therefore, be diversed from being looked as industry from tourism.

Evidence was also placed in our hands to show that the Ministry of Industrial Development, New Delhi, by a notification published in the Gazette of India on 26-8-1971 regarded hotels as industries falling within the purview of that notification. Such being the case the view taken by the revenue is contrary to the established notions and is at variance with the declared policy of the Government and it is no argument to say by the contrast of languages used in Section 80J and Section 32A that Section 32A is deliberately meant not to extend the benefit of investment allowance to hotels. Several other papers also were filed before us to show how important are the earnings of the hotels all to impress upon us that hoteliering is an industry and the hotel is an industrial undertaking producing articles or things satisfying the human needs and, therefore, entitled to the investment allowance.

3. As against these arguments which we have summed up above advanced in favour of the assessee's claim the arguments advanced against the assessee, i.e., in support of the Commissioner (Appeals)'s view, was that hotel renders only professional service. There is no question of service industry being regarded as an industrial undertaking. Reliance in this context was placed very strongly on the decisions of the Kerala High Court and the Madras High Court. A hotel does not manufacture a thing or produce. Explaining the meaning of the expression 'production' and 'manufacture' it was submitted that the end product sold by a hotel, though may be commercially different from the raw material used, is not the result of any manufacture or production. Repeatedly referring to the observations made by the Commissioner (Appeals) where references were made to the two

High Courts decisions, all to press the point that hotels are deliberately excluded from the purview of Section 32A he submitted the hotel industry is not entitled to investment allowance. The Government of India policy must have been to accelerate the industrialization of the country by offering concessions and incentives through the fiscal enactments but not to extend these benefits to the hotels through the fiscal enactments. The concessions given are sought to be given to promote tourism though ultimately it may result in building up of several hotels to attract tourists but that could not be equated to hotels being treated as industrial undertakings referred to in Section 32A. The concessions and incentives sought to be given treating the hotel as industry suggest at least by implication that hotels are not industries and unless they are industries they cannot be industrial undertaking. The allowance referred to in Section 32A cannot be extended. We have to look not to the machinery used but to the purpose of production of the articles to see whether it is an industrial undertaking for the purpose of business of manufacture or production of any article or thing and it is this requirement that is not satisfied by a hotel. So proceeded the argument of the department.

4. As against this mutually competiting and conflicting arguments we have to see what is meant by the expression 'industrial undertaking' used in Section 32A and what would be the intention of the Legislature or at least nearer to its intention. The relevant provisions of Section 32A say that 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 purpose of the business carried on by him, there shall be allowed a deduction of a sum by way of investment allowance equal to 25 per cent of the actual cost of the ship, aircraft, machinery or plant to the assessee. Sub-section (2) which is descriptive in nature describes the machinery or plant and the conditions it should satisfy to be eligible for the investment allowance and that Sub-section (2) is in the following terms : (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.

Explanation : For the purposes of this sub-section and Sub-sections (2B) and (4),-(7) 'new ship' or 'new aircraft' or 'new machinery or plant' shall have the same meanings as in the Explanation to Clause (vi) of Sub-section (1) of Section 32 ; (2) an industrial undertaking shall be deemed to be a small-scale industrial undertaking, if the aggregate value of the machinery and plant (other than tools, jigs, dies and moulds) installed, as on the last day of the previous year, for the purposes of the business of the undertaking does not exceed,- The expression 'industrial undertaking' is not defined in Section 32A but there is a definition which states which industrial undertaking could be deemed to be a small-scale industrial undertaking with which we are not concerned in this matter. The expression 'industrial undertaking' has come for consideration before a Bangalore Special Bench of the Tribunal in the case of First ITO v. Dr. P. Vittal Bhat [1983] 6 ITD 560. There the assessee was a consulting Radiologist. He was receiving salary from some hospitals in that capacity. In addition he was maintaining clinic for treating his own patients on payment of consultation charges and charges for X-ray photographs. He claimed investment allowance on the X-ray unit on the ground that he was only a professional. The contention raised before the Tribunal on behalf of the department was that the assessee did not manufacture or produce any article or thing so as to be entitled to investment allowance while the assessee contended that the clinic was to be treated as an industrial undertaking. To decide that matter it became necessary to examine the meaning of the expression 'industrial undertaking'. The Tribunal drawing support from several judicial decisions referred to in that judgment held that an undertaking is an activity of a man which in commercial or business parlance means an activity engaged in with a view to earn profits; any enterprise undertaken by a person would be an industrial undertaking. Industry means any business, trade, undertaking, manufacture or calling of employers and includes any calling, service, employment, handicraft or industrial occupation or avocation of workmen. Thus, industrial undertaking is considered to be any business, work or project, which one engages in or attempts or an enterprise. The Special Bench there noticed a

decision of the Supreme Court in Bangalore Water Supply & Sewerage Board v. A. Rajappa AIR 1978 SC 548 where the Supreme Court held that even the restricted category of professions come under the definition of industry in Section 2(j) of the Industrial Disputes Act, 1947. It was further held there that if a business is run for production or supply of goods and services with an eye on profit, it is plainly an industry. The Calcutta High Court in CIT v. Textile Machinery Corporation [1971] 80 ITR 428 held that the words 'industrial undertaking' in the Indian Income-tax Act, 1922 should be interpreted to mean any venture or enterprise which a person undertakes to do and which has relation to some industry or has come industrial consequences. The notion of an undertaking basically means that it has got to be a concrete and a tangible venture in the path of industry to make it an industrial undertaking. Though this decision was reversed by the Supreme Court on the conclusion reached by the High Court on the question of law, the observations of the High Court are still, in our opinion, valid and relevant. Now the question is whether the running of a hotel could be considered as an industrial undertaking. Applying the above elucidation of this expression as judicially interpreted coupled with the fact that the Government of India treated hotels as an industry for the purpose of grant of subsidy, it cannot be gainsaid that running of a hotel is an industrial undertaking. All the indicia of undertaking and an industry making it an industrial undertaking are present. The decisions given by the Tribunal in the cases referred to above do support the view that we are taking in the sense that if processing of shrimps can be held to be an undertaking as also taking of X-ray photo, there is no reason why a hotel cannot be considered as an industrial undertaking. Having crossed the first hurdle, the second important impediment we have to overcome is whether this industrial undertaking is engaged in the manufacture or production of any article or thing. The machinery should be used for the purpose of business of construction, manufacture or production of any article or thing other than the prohibited items in order to qualify for investment allowance. "'_ Is there a manufacture or production of any article or thing in the case of a hotel is the question that arises in this context. For this purpose strongest reliance was placed by the revenue on the Kerala High . Court decision in the case of Casino (P.) Ltd. (supra). There the assessee was a private limited company also running a hotel business. For the

assessment year 1968-69 it claimed to be an industrial company as the term is defined in the Finance Act, 1968. The claim of the assessee was that the activity of converting the raw materials into finished products, namely, food-stuffs did amount to carrying on of an activity of manufacture and, therefore, the assessee was an industrial company within the meaning of definition of 'industrial company' as given in the Finance Act. The Tribunal accepted the assessee's contention but on a reference the High Court took a different view. The definition of industrial company as given in the Finance Act, should first be noticed to understand this controversy and this is as under : (d) '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.

It is interpreting the expression 'manufacture or processing of goods' the Kerala High Court held that: 'In our view, the word "manufacture" has various shades of meaning, and in the context of sales tax legislation, if the goods to which some labour is applied remain essentially the same commercial article, it cannot be said that the final product is the result of manufacture.' The result of our discussion can be summed up in these terms : Manufacture is a process which results in an alteration or change in the goods which are subjected to such manufacture. A commercially new different article is produced. May be that is produced by manual labour or mechanical force or even by nature's own process such as drying by heat of the sun as in a salt pan [Ardeshir H. Bhiwandiwala v. State of Bombay [1961] 11 L.LJ. 77 (SC)] or fermentation of toddy [Thomas y: District Judge, Alleppey [1965] K.L.J. 487 (Ker.)]. The essential question is whether a commodity which, in a commercial sense, is different from the raw materials has resulted.(p. 298) ... In other words, activities of a nature in regard to goods which may not amount to manufacture but which would result in the doing of something to the goods to change or alter their form may be taken in by the term 'processing.... (p. 299) After thus '"explaining the meaning of the words 'manufacture' and 'processing', the High Court applied the test of common parlance and pointed out that in common parlance the activity of the assessee could not be said to be manufacture or processing of goods because no customer, who comes to the hotel would ask for the items in the menu list to be manufactured and supplied to

him. So also processing. So construing the expression in the popular sense, the Kerala High Court held that the assessee was not engaged in the carrying on in the activity of manufacture or processing of goods. According to the Kerala High Court, the hotel is only a trading concern, although it held that the various items of food-stuffs and beverages produced in the hotel are intended for the trading and the conversion of the raw materials into food-stuffs was only a process in trading. This is the decision given by the Kerala High Court on the language used in Section 2(6)(W) of the Finance Act. Let us now compare and contract this language with the language used in Section 32A(2)(&)(m). Here the striking difference is absence of the word 'processing' and the use of the word 'production'. The second dissimilarity which is again striking is use of the expression 'any article or thing' instead of 'goods'. Now we have to see whether the difference in the language makes any difference. If the expression 'manufacture' as defined by the Kerala High Court in Casino (P.) Ltd.'s case (supra) is to be applied mutatis mutandis we have to for the time being exclude the expression 'manufacture'. Let us say the hotel does not manufacture any article or thing. The question we have to then ask is whether it is engaged in the production of any article or thing, i.e., whether it is producing any article or thing. The term 'processing' is explained by the Kerala High Court as doing something to the goods to change or alter their form.

Does the expression 'production' means the same as processing or different. If production and processing are different expressions, one is not to convey the meaning of the other, then we have to see whether the hotel produces any article or thing by converting the raw materials into food-stuffs. The expression 'production' has been defined at page 20 of the paperbook as under : 1. Funk and Wagnalla Standard College Dictionary No. 4-page 1075, Production means : (a) That which is produced, (b) Any tangible result of industrial, artistic or literally efforts.

2. Websters New Collegiate Dictionary, N.Y. page 918-Production means : (a) Something produced (b) The creation of utility, e.g., making of goods available for human wants.

(a) act of producing, creation, manufacture (6) That which is produced, a product (c) The creation of value : The producing of articles having exchange value.

The Websters New Collegiate Dictionary states the creation of utility, e.g., making of goods available for human wants is production. A hotel certainly produces articles of utility for satisfaction of human wants.

All the food-stuffs that it sells along with beverages are all articles or things produced out of raw materials. There is no gainsaying of this fact. It produces a commodity which in a commercial sense is so different from the raw material. If we apply the same common parlance test which the Kerala High Court applied to understand the legislative intent in using the expression 'manufacture or processing', we cannot say that the hotel does not produce the eatables and beverages that it serves by offering for sales to its customers. If we carefully read the decision of the Kerala High Court, it did make a distinction between processing and production. The producing of goods, it was held, does not amount to processing of goods, e.g., while discussing the case of North Bengal Stores Ltd. v. Board of Revenue 1 STC 157, 163 it was observed that the Calcutta High Court held that process of dispensing by mixing the medicines, according to the prescription is one of producing the goods for sale. It also referred to the meaning of the expression 'manufacture' which meant in common parlance to bring into being or to produce something in a form in which it is capable of being sold or supplied in the course of business. Now since the definition of 'industrial company' in the Finance Act, is so different from the language in Section 32A the meaning given to the expression 'manufacture or processing of goods' cannot be applied to the manufacture or production of any article or thing used in Section 32A.This is the basic difference between that decision which has not been noticed by the authorities below and which has been pointed out by the learned chartered accountant Shri Pradip Dinodia, who appeared before us for the assessee. This difference in language distinguishes the ruling given in that case. So also is the position with regard to the Madras High Court decision in the case of Buhari Sons (P.) Ltd. (supra). Here also the language used to define an industrial company was not different from the language used in the case before, the Kerala High Court. Language being identical, the Madras High Court has no difficulty in applying the

ratio of the Kerala High Court decision and decide the matter against the assessee. There are no doubt certain decisions given in favour of the assessee by two High Courts, one was the Madras High Court and another was the Kerala High Court but there those decisions were given by importing the meaning of the expression as used in the Factories Act, 1948. The Madras High Court pointed out that in the absence of any definition given in the statute the words occurring in that statute will have to be understood with reference to the objects of the Act and in the context in which they occur. The definition given for the words in one statute cannot be imported for interpreting the same words in the statute. For this reason it did not apply the rulings of those two High Courts even though they are in favour of the assessee. The Madras High Court has pointed out in this case that the manufacture of eatables cannot be taken as manufacture of goods. While elaborating this view, the Madras High Court pointed out : ...We are of the view that the word 'goods' has been used here in the sense of merchandise, that is, articles for sale. The expression 'goods' if understood in a commercial sense will not include the eatables prepared in a hotel.... (p. 17) Thus, the Madras High Court has added the meaning of the word 'goods' used in their definition as an additional reason to deny the assessee's claim. Here again in Section 32A, as we have pointed out earlier, the word 'goods' was not used but the words 'article or thing' were used and according to the elucidation of law by the Madras High Court, if articles for sale were prepared, they would be covered by the expression 'manufacture or production'. In a way the use of the word 'article' in Section 32A and the absence of the word 'goods' distinguishes the Madras High Court decision and makes it inapplicable to the facts before us and in a way goes to fortify our view that the food-stuffs prepared by a hotel are production of articles or things.

Thus, neither the Madras High Court nor the Kerala High Court decisions referred to above help the revenue's view, .inasmuch as, there is any amount of dissimilarity in the language as well as the concepts.

As we have noticed in the literature placed in our hands, the hotels are treated by the Government as industries and there is no gainsaying of the fact. The various paper cuttings given to us do show the intention of the Government and What is more the Government of Orissa has treated hotels as industries and even the

Central Government in the Ministry of Industrial Development treated the hotels as industries eligible for Central Government Investment Subsidy (vide copy of the Gazette Notification at page 13 of the paperbook). Nothing more is, therefore, needed to advance the assessee's case that hotels are being treated as industries and are to be treated so. Were it so, is there a necessity to use that expression in Section 32A and can it be inferred by the absence of the term in Section 32A that this benefit is not available to hotels. As we have observed earlier, all that is required is there must" be machinery or plant used by an assessee for the purpose of his business and that the business must be an industrial undertaking engaged in the manufacture or production of any article or thing. We have endeavoured to show that the assessee is an industrial undertaking and it is producing the articles, namely, the food-stuffs and beverages for sale and these are not articles or things specified in the list in Eleventh Schedule of the Act, which are excluded from the benefit of investment allowance.

5. In this context we may also refer to another decision of the Madras High Court in the case of Engine Valves Ltd. (supra). Here the question is whether a canteen can be regarded as a factory building entitled to higher rate of depreciation. While dealing with this case Justice Balasubramanyan speaking for the Court, accepting the assessee's contention, gave the following reason namely: ...The second reason is that a canteen where cooking and other preparations are carried on either in the kitchen or elsewhere, can be regarded in the strictest sense of the term, as a place where manufacture is carried on, although, in normal parlance, we do not refer to the process of cooking as a process of manufacture.... (p.

348) We have already referred to this passage relied on by the learned chartered accountant on behalf of the assessee elsewhere in this order.

This passage does support the view that we are taking and canvassed on behalf of the assessee that cooking and other preparations do amount to a process of manufacture even though a different view was taken by the Madras High Court in other case. At least this supports the view that there was some production involved. What is more relevant in this case is the observations made by the Madras High Court at page 351 where it held that in cases where modern

mechanical processes are adopted in a kitchen or canteen for the purposes of cooking meals and making other preparations the analogy of a manufacturing process would be more apparent. The Madras High Court had to consider the decision of the Kerala High Court in Casino (P.) Ltd.'s case (supra) but distinguished it by pointing out that the point for decision was different. The assessee is declared as a five star delux hotel by the Government.

Latest machinery is being used in the preparation of food articles.

This process accords with the view expressed by the Madras High Court in the case of Engine Valves Ltd. (supra). Lastly we cannot but notice the extracts from the judgment of the Supreme Court in the case of Northern India Caterers (India) Ltd. v. Lt. Governor of Delhi AIR 1980 SC 674 or Northern India Caterers (India) v. Lt. Governor of Delhi 1978 Tax LR 2316. The Supreme Court pointed out in this case as follows : Like the hotelier, a restaurateur provides many services in addition to the supply of food. He provides furniture and furnishings, linen, crockery and cutlery, and in the eating places of today he may add music and a specially provided area for floor dancing and in some cases a floor show. The view taken by the English Law found acceptance on American soil, and after some desultory dissent initially in certain states it very soon became firmly established as the general view of the law. The first edition of American Jurisprudence Vol. 46, p. 207, para 13 sets forth the statement of the law in that regard, but we may go to the case itself. Elects B. Merrill v. James W. Hodson 1915 BLRA 481 from which the statement has been derived.... (p. 2317) This shows that the hotel industry is not only supplying foods but doing several other things, all of which put together amount to an industry, which would attract the tourists. The object of the Government of India in the Ministry of Finance cannot be said to be different from the object in the Tourist Department of the Government of India. If the Tourist Department of the Government of India treats the hotels as industries, it cannot be that by fiscal enactment the Government of India are treating hotels as different unless there are words to the contrary. The benefit of investment allowance is, therefore, available to the hotels also provided it satisfies all the other conditions laid down in Section 32A.6. From the above discussion, we have come to the conclusion that the assessee is entitled to the claim of investment allowance and it

should be allowed to the assessee. It is not the case of the revenue that the other conditions are not satisfied. This point is, therefore, decided in favour of the assessee.

7. There is another point in this appeal which deals with the disallowance of Rs. 3,782 under Section 40A(5) of the Act. This sum represents the expenditure incurred by the assessee to provide perquisites in the shape of rent-free accommodation and electricity and water charges. The ITO disallowed this sum by applying the provisions of Section 40A(5), which the Commissioner (Appeals) has confirmed. The Tribunal, Delhi Bench 'C' in the case of ITO v. ESPI Agricultural Machineries Ltd. [1984] 9 ITD 224 on identical issue held in favour of the assessee. The facts there are : The assessee-company paid salary of Rs. 48,000 and perquisites valued at Rs. 24,322 to its director. The ITO disallowed the perquisite value in excess of one-fifth of salary, but the Commissioner (Appeals) held that only Section 40(c) was applicable, so that only the overall limit of Rs. 72,000 should be applied and not the separate limits for salary and perquisites laid down in Section 40A(5). Consequently, the Commissioner (Appeals) deleted the disallowance. (p. 225) As decided in the cases of CIT v. Bharat Vijay Mills Ltd. [1981] 128 ITR 633 (Guj.) and ITO v. Sapt Textiles Products India Ltd. [1982] 1 SOT 269 (Bom.) (SB), only the ceiling of Rs. 72,000 under Section 40(c) and first proviso to Section 40A(5) was applicable to a director, whether he was an employee of the company or not. The Commissioner (Appeals) was, therefore, justified. (p. 225) Following this view with respect, we hold that the Commissioner (Appeals) is not justified in his view and we direct that the amount of Rs. 3,782 should be deleted.