(5) It has also been held by this Court and by the Supreme Court that even a person in unauthorised possession has to be dispossessed in accordance with law and cannot be dispossessed by any officer at his sweet will or taking the law in his own hand. As I have held above, the Collector has no jurisdiction to restore possession of the land to respondents 5 and 6 and, therefore, the impugned orders of respondents 3 and 2, copies of which are Annexures 'D' and 'E' to the writ petition, are without jurisdiction and have to be quashed.

(6) For the reasons given above, I accept this writ petition with costs and quash the impugned orders. Counsel's fee Rs. 100.

N.K.S.

INCOME-TAX REFERENCE

Before Prem Chand Pandit and Bhopinder Singh Dhillon, JJ.

THE COMMISSIONER OF INCOME-TAX,—*Applicant*

versus

M/S INDIAN MOTOR TRANSPORT CO. (P) LTD., KARNAL,—*Respondent.*

I.T. Ref. No. 44 *of* 1971.

January 16, 1973.

Income-tax Act (*XI of* 1922)—*Sections* 10(2)(*vi-b*) *and* 35(*II*)—*Assessee acquiring new machinery after the specified date, but selling it before ten years of the acquisition—Factum of such sale in the knowledge of the Income-Tax Officer at the time of assessment—Income-Tax Officer—Whether should first allow development rebate in respect of such machinery under section* 10(2)(*vi-b*) *and subsequently withdraw it under section* 35(*II*).

Held, that according to clause (vi-b) of section 10(2) of Income-Tax Act, 1922, if all the conditions mentioned therein are satisfied, the assessee is entitled to development rebate on the new machinery acquired by him before a particular date specified therein. One of the conditions specified therein is that the machinery is not sold to any person other than the Government before the expiry of ten years from the end of the year in which it was acquired. If, at the time of

the assessment, the machinery has not been sold, the development rebate would be allowed and later on if such machinery is disposed of before the expiry of the relevant period, the rebate would be withdrawn on the ground that the same would be deemed to have been wrongly allowed in the first instance. In a case, however, where at the time when the assessment is being made by the Assessing Authority, it is in its knowledge that the machinery which the assessee had purchased and for which he was claiming the development rebate has already been sold before the expiry of relevant period, then the development rebate cannot be given to the assessee. The concession of rebate is given to the assessee only on the condition that he does not dispose of the machinery to any person other than Government before the expiry of 10 years of its purchase. To require the Income-Tax Officer to first allow the development rebate to the assessee and subsequently withdraw the same under section 35(II) which deals with the power of rectification of mistakes will amount to requiring the Income-Tax Officer to knowingly commit the mistake first and then rectify it. Section 35(II) would come into play only when the machinery has been sold before the expiry of the requisite period but after the assessment has been made and when that fact is brought to the notice of the Income-Tax Officer, he can correct the mistake under this section on the ground that there is a mistake apparent from the record.

Reference made by the Income-Tax Appellate Tribunal, Chandigarh bench to the Hon'ble High Court for opinion of the following important question of law arising out of the Tribunal's order, dated 4th July, 1970, passed in I.T.A. No. 2458 of 1968-69, for the Assessment Year 1958-59 :—

> *"Whether on the facts and in the circumstances of the case, the Tribunal was justified in law in directing the Income-tax Officer to first allow full development rebate under the Rules and subsequently withdraw it under section 35(II) of the Indian Income-tax Act, 1922, if applicable?"*

D. N. Awasthy, Advocate, *with* B. S. Gupta, Advocate, *for the applicant.*

J. S. Wasu, Advocate, *with* S. K. Syal, Advocate, *for the respondent.*

JUDGMENT

PANDIT, J.—At the instance of the Revenue, the Income-tax Appellate Tribunal has referred the following question of law for our opinion:—

> "Whether on the facts and in the circumstances of the case, the Tribunal was justified in law in directing the Income-tax

Officer to first allow full development rebate under the Rules and subsequently withdraw it under section 35(11) of the Indian Income-tax Act, 1922, if applicable?"

(2) The assessee is a Private Limited Company plying passenger buses. Its assessment for the year 1958-59 (accounting year ended on 31st March, 1958) was at first completed on 16th July, 1960, but the same was subsequently set aside by the Appellate Assistant Commissioner, who directed that a fresh assessment be made. That was done by the Income-tax Officer on 31st August, 1967. The Company claimed allowance, by way of development rebate, of Rs. 44,586 under section 10(2) (vi-b) of the Indian Income-tax Act, 1922, hereinafter called the Act, in respect of buses purchased by it before 31st December, 1957, in the computation of its business income. The Income-tax Officer, however, did not allow this rebate on the ground that all the said buses were sold by the Company within eight years from the date of their purchase.

(3) When the matter came before the Appellate Assistant Commissioner, it was submitted on behalf of the Company that although section 35(11) of the Act empowered the Income-tax Officer to rectify his order by withdrawing the development rebate in such cases, but under the law, the rebate should first be allowed under section 10(2)(vi-b) and then withdrawn under section 35(11) of the Act. The Appellate Assistant Commissioner, however, did not accept this submission and upheld the order of the Income-tax Officer observing that at the time when the Income-tax Officer was making the fresh assessment, he knew that as the buses had been sold by the Company within eight years of their purchase, the development rebate would have to be withdrawn subsequently, and, therefore, there was no point in allowing it in the first instance and then withdrawing the same later on. The Appellate Assistant Commissioner was also of the view that there was no legal prohibition in disallowing the rebate at the assessment stage, if the Income-tax Officer knew at that time that the buses had been disposed of by the assessee within eight years of their acquisition.

(4) The Income-tax Tribunal, on second appeal, however, reversed the concurrent decision of both the Authorities below and held that in terms of section 10(2)(vi-b), the development rebate had first to be allowed and subsequently withdrawn under section 35(11) of the Act, if the latter section was applicable.

(5) When the Commissioner of Income-tax made an application for referring to this Court the above question of law arising out of the order of the Tribunal, it was argued on behalf of the assessee that the matter was of academic interest only and the question of law be not referred to this Court for opinion. It was said that in a similar case, a decision was given by the Tribunal, but the Revenue had not taken that matter to the High Court. The Tribunal, however, did not agree with this submission, because it was of the view that the question was not purely of academic interest inasmuch as if the Revenue succeeded on the said question of law, the assessment made on 31st August, 1967, would be sustained, which was otherwise barred by time.

(6) Under section 10(1) an assessee has to pay the tax in respect of the profits and gains of any business, profession or vocation carried on by him. Under sub-section (2) of this section, such profits or gains have to be computed after making the allowances mentioned in the various clauses of this sub-section. The relevant portion of clause (vi-b) reads:

"(vi-b) in respect of a new ship acquired or new machinery or plant installed after the 31st day of March, 1954, which is wholly used for the purposes of the business carried on by the assessee, a sum by way of development rebate in respect of the year of acquisition of the ship or of the installation of the machinery or plant, equivalent to.—

(i) * * * *

(ii) in the case of machinery or plant installed before the 1st day of January, 1958, and in the case of machinery or plant, twenty-five per cent of the actual cost of the ship or machinery or plant to the assessee;

* * * *

* * * *

Explanation—2. * * *.

Provided that no allowance under this clause shall be made unless:—

(a) The particulars prescribed for the purpose of clause (vi) have been furnished by the assessee in respect of the ship or machinery or plant; and

(b) except where the assessee is a company being a licence within the meaning of the Electricity (Supply) Act, 1948, or where the ship has been acquired or the machinery or plant has been installed before the 1st day of January, 1958, an amount equal to seventy-five per cent of the development rebate to be actually allowed is debited to the profit and loss account of the relevant previous year and credited to a reserve account to be utilised by him during a period of ten years next following for the purposes of the business of the undertaking, except—

(i) for distribution by way of dividends or profits, or

(ii) for remittance outside India as profits or for the creation of any asset outside India, ...

and if any such ship, machinery or plant is sold or otherwise transferred by the assessee to any person other than the Government at any time before the expiry of ten years from the end of the year in which it was acquired or installed, any allowance made under this clause shall be deemed to have been wrongly allowed for the purposes of this Act."

(7) Under this clause, if an assessee acquires new machinery after 31st March, 1954, and the same is wholly used for the purposes of the business carried on by the assessee, development rebate to the extent of 25 per cent on the actual cost of the machinery would be allowed to the assessee. Under the proviso to this clause, however, this allowance will not be given to the assessee, unless he satisfies the two conditions mentioned in clauses (a) and (b) to this proviso. It is further mentioned in this proviso that if any machinery is sold or otherwise transferred by the assessee to any person, except the Government, at any time beofre the eypiry of 10 years from the end of the year in which it was acquired, then any allowance made under this clause would be deemed to have been wrongly allowed to the assessee.

(8) It may be stated that both the counsel agreed that the passenger buses would be included in the word "machinery" occurring in the above clause. It is the common case of the parties that these

buses were acquired after 31st March, 1954, and were wholly used for the purposes of the business carried on by the Company. Further it is not the case of the Revenue that the assessee did not comply with the conditions mentioned in (a) and (b) of the proviso to the said clause. On these facts the assessee would have been entitled to the development rebate stated in the clause. The difficulty had, however, arisen because of the further fact that the Company had disposed of the said buses within eight years of their purchase. The case of the assessee was that since it had complied with the requirements of clause (vi-b), it was entitled to the said rebate and if the buses had been sold within eight years from the date of their acquisition, the said rebate could be withdrawn by resorting to the provisions of section 35(11) of the Act. The position taken up by the Revenue, on the other hand was that it was mentioned in the proviso to clause (vi-b) itself that if the machinery had been sold to a person other than the Government before the expiry of ten years from the end of the year in which it was purchased, any allowance made under this clause would be deemed to have been wrongly allowed and, consequently, the Company was not entitled to the development rebate in the very first instance.

(9) According to the Supreme Court decision in *Indian Oversees Bank Ltd.* v. *Commissioner of Income-tax, Madras* (1), the rebate under this clause is a concession granted to an assessee, but that concession is made subject to the fulfilment of certain requirements. The grant of the allowance is dependant on the compliance of the conditions prescribed in the proviso to this clause.

(10) In another ruling of the Supreme Court in *Chittoor Motor Transport Co. (p) Ltd.* v. *Income-tax Officer, Chittor* (2), it was said that the Legislature had directed the giving of a development rebate on conditions, which were mentioned in clause (vi-b), one condition being that if the assessee sold the machinery before the expiry of ten years from the end of the year in which it was acquired, to a person other than the Government, he would forfeit such rebate.

(11) It is obvious, therefore, that if the assessee does not comply with the requirements of section 10(2) (vi-b), he is not entitled to claim development rebate allowance.

(1) (1970) 77 I.T.R. 512.
(2) (1966) 59 I.T.R. 238.

(12) The arguments addressed to us concerned the last portion of the proviso, the relevant part of which is given below:—

> "and if any such ..... machinery ..... is sold or otherwise transferred by the assessee to any person other than the Government at any time before the expiry of ten years from the end of the year in which it was acquired ..... any allowance made under this clause shall be deemed to have been wrongly allowed for the purpose of this Act."

The argument of the assessee was that according to the above sentence, the allowance had first to be given and if the machinery had been sold before the expiry of the relevant period, then that allowance would be deemed to have been wrongly allowed. We are, however, dealing with a case, in which, at the time when the assessment was being made by the Assessing Authority, it had come to its knowledge that the buses, which the Commany had purchased after 31st March, 1954, and on the basis of which it was claiming the development rebate, had already been sold by it before the expiry of the relevant period. The question is—should it even in these circumstances, allow the assessee the development rebate? It is clear from clause (vi-b) that if all the conditions mentioned therein are satisfied, the assessee is entitled to the development rebate. One of the conditions specified therein is that the machinery is not sold to any person other than the Government before the expiry of 10 years from the end of the year in which it was acquired. If, at the time of the assessment, the machinery has not been sold, the rebate would be allowed and later on if the machinery is disposed of before the expiry of the relevant period, the rebate would be withdrawn on the ground that the same would be deemed to have been wrongly allowed in the first instance. But in a case where at the time of the assessment, it is the common case of the parties , that the machinery had been sold before the expiry of the requisite period, then the development rebate would not be given to the assessee. No other conclusion is possible in these circumstances, because this concession is given to the assessee on the condition that he does not dispose of the machinery to any person other than the Government before the expiry of 10 years of its purchase. If he infringes this condition, then obviously he is not entitled to the allowance under this clause. There is no point in allowing the reabte at the time of the assessment, when it is admitted before the Assessing Authority that the machinery has

in fact been sold before the expiry of the relevant period. It is not possible to accept the contention of the assessee that in such a contingency the Income-tax Officer should in the first instance grant the rebate and then the very next moment withdraw the same by resorting to the provisions of section 35(11) of the Act. The relevant portion of section 35 is:—

"*Rectification of mistake.*—(1) The Commissioner or Appellate Assistant Commissioner may, at any time within four years from the date of any order passed by him in appeal or, in the case of the Commissioner, in revision under section 33-A and the Income-tax Officer may, at any time within four years from the date of any assessment order or refund order passed by him on his own motion rectify any mistake apparent from the record of the appeal, revision assessment or refund as the case may be and shall within the like period rectify any such mistake which has been brought to his notice by an assessee:

* * * * *

(11) Where an allowance by way of development rebate has been made wholly or partly to an assessee in respect of a ship, machinery or plant in any year of assessment under clause (vi-b) of sub-section (2) of section 10, and subsequently at any time before the expiry of ten years from the end of the year in which the ship was acquired or the machinery or plant was installed—

(i) the ship, machinery or plant is sold or otherwise transferred by the assessee to any person other than the Government ; or

(ii) the assessee utilises the amount credited to the reserve account under that clause—

(a) for distribution by way of dividends or profits; or

(b) for remittance outside India as profits or for the creation of any asset outside India; or

(c) for any other purpose which is not a purpose of the business of the undertaking ;

> the development rebate originally allowed shall be deemed to have been wrongly allowed, and the Income-tax Officer may, notwithstanding anything contained in this Act, proceed to re-compute the total income of the assessee for the relevant year as if the re-computation is a rectification of a mistake apparent from the record within the meaning of this section, and the provisions of sub-section (1) shall apply accordingly, the period of four years specified therein being reckoned from the end of the year in which the transfer takes place or the money is so utilised."

(13) This section, as would be seen, talks of "rectification of mistake". Why should the Income-tax Officer knowingly commit the mistake and then rectify it under this section? Then again, the Revenue might in a case, like the present one, be faced with the question of limitation, because under section 35(11), the period of four years for correcting the mistake has to be reckoned from the end of the year in which the transfer of the machinery takes place. The buses, in the instant case, had been sold between 16th July, 1960, and 31st December, 1965, and, therefore, the limitation for correcting the mistake under this section might perhaps be over. If the point of limitation is decided against the Revenue, an illegality will be perpetuated and the Revenue will stand to loss thereby. The acceptance of the assessee's contention, therefore, would result in the grant of development rebate, where it could not be allowed, because the buses had been sold before the expiry of the relevant period. Section 35 would come into play only when the buses had been sold before the expiry of the requisite period, but after the assessment had been made and when that fact was brought to the notice of the Income-tax Authorities, they could correct the mistake under this section on the ground that there was a mistake apparent from the record. According to the contention of the assessee, in the present case, the Income-tax Officer must first commit the mistake by allowing the development rebate and then endeavour to rectify it by resorting to the provisions of section 35 and ultimately fail, because of the bar of limitation. There is thus no merit in this contention.

(14) I will, therefore, answer this question in the negative in favour of the Revenue. There will, however, be no order as to costs.

DHILLON, J.—I agree.

B. S. G