*Before G. C. Mital and S. S. Sodhi, JJ.*

PORRITTS AND SPENCER (ASIA) LTD., FARIDABAD,—*Applicant.*

*versus*

COMMISSIONER OF INCOME TAX, HARYANA, ROHTAK,—*Respondent.*

*Income Tax Reference Nos. 87 and 88 of 1980*

March 8, 1989.

*Income Tax Act (XLIII of 1961)—Ss. 33(1)(a) and (b), 33(1A) (b), 80 J—Assessee company importing second hand plant and machinery for reconditioning—Cost of reconditioning 91 per cent of value of old machinery—Such reconditioned machinery—Whether acquires character of new machinery—Assessee—Whether entitled to development rebate.*

*Held,* that if the cost of reconditioning is equal to or less than the cost of the second hand machinery, the machinery cannot be termed new. Whenever the cost of reconditioning and replacement of worn out parts was 5 to 7 times of the cost of the second hand machniery, the reconditioned machinery was considered as new machinery. That being not the facts of the case here, we are constrained to hold that the machinery could not be considered new so as to ask for development rebate under S. 33(1) of the Income Tax Act, 1961. Since the assessment year in question is after the insertion of sub-section (1A) in S. 33, whereunder the assessee is entitled to development rebate for used machinery, the assessee could be allowed development rebate under that provision and the Tribunal was right in allowing the development rebate at the rate permissible for the used machinery and plant under that sub-section. (Para 18).

*Reference under section 256(1) of the Income Tax Act, 1961 by the Income Tax Appellate Tribunal, Chandigarh Bench, Chandigarh to the Hon'ble High Court of Punjab and Haryana for opinion of the following question of law arising out of the Tribunal's order dated 30th March, 1979 in I.T.A. No. 847 of 1976-77 in R.A. Nos. 91 and 92 of 1979 for the assessment year 1972-73:—*

(i) *Whether, on the facts and in the circumstances of the case, the Tribunal erred in law in holding that the assessee was entitled to depreciation at Rs. 1 lac capitalised towards, building, depreciation and development rebate at Rs. 7 lacs capitalised towards plant and machinery and depreciation and development rebate at Rs. 2 lacs treated as a book and as such a plant.*

(ii) *Whether on the facts and in the circumstances of the case, the Tribunal was justified in holding that for purposes of computing the disallowance under section 40A(5) of the Income Tax Act, the provisions of Rule 3(c)(ii) of the Income-tax Rules should be invoked.*

G. L. Sharma, Sr. Advocate with M/s Anoop Sharma and S. S. Mahajan, Advocates, *for the Appellants/Petitioners.*

Ashok Bhan, Sr. Advocate with Mr. Ajay Mittal, Advocate, *for the Respondents.*

JUDGMENT

*Gokal Chand Mital J.*

(1) Porritts and Spencer (Asia) Ltd.. the assessee, is a public limited company. The assessee maintained books of account on mercantile basis and for the assessment year 1972-73 filed return declaring loss of Rs. 23,04,840.00 which included development rebate of Rs. 21,44,985.00 and deduction under section 80J of the Income Tax Act, 1961 (hereinafter called the Act) amounting to Rs. 8,01,872.00

(2) The assessee's case was that it had imported second hand reconditioned plant and machinery from Porritts and Spencer Ltd. (U.K.) and the reconditioning cost in relation to the value of the second hand plant and machinery in some cases exceeded 80 per cent and the second hand machines were completely knocked down, separated and rebuilt after replacement of all worn out parts by the repairers. These facts are contained in Annexure 'G', printed at page 92 of the paper book, produced by the assessee before the Income Tax Officer. Annexure 'H' printed at page 94 of the paper book gives the details of the machines and its parts, basic value of the second hand machinery, reconditioning cost, including total value paid by the assessee to the U.K. Company. The basic value of the second hand plant and machinery was £ 60,780 and the reconditioning cost is shown as £ 55,853, which is 91 per cent of the cost of the second hand plant and machinery. The total value paid was Rs. 50,06,453.00.

(3) On the aforesaid cost of the reconditioned plant and machnery, which is over Rs. 50 lacs, the assessee claimed development rebate under section 33(1) (a) of the Act at the rates specified in clause (b) which is allowable for new machinery or plant. The

Income Tax Officer took notice of the fact that the machinery and plant were not new and were second hand duly reconditioned at a cost which was less than the value of the second hand ones as the reconditioning and replacement cost was 91 per cent and, therefore, concluded that it was not a new machinery or plant and section 33(1) (a) of the Act was not applicable and instead applied section 33(1A)(b) under which rebate at a lower rate was permissible for used machinery or plant. So, one of the questions before us would be whether second hand machinery and plant on renovation or reconditioning can be considered new machinery and plant within the meaning of section 33(1) (a) of the Act.

(4) The assessee had entered into a technical know-how collaboration agreement with Porritts and Spencer Ltd., Lancashire (U.K.) under which a sum of rupees ten lacs was paid under the following heads —

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|---|---|
| (1) Building account : | Rs. 1,00,000 |
| (2) Plant and machinery : | Rs. 7,00,000 |
| (3) Books, design and formulae : | Rs. 2,00,000 |
| Total : | Rs. 10,00,000 |

(5) The assessee claimed depreciation on the entire amount of rupees ten lacs and development rebate on the amount of rupees nine lacs consisting of plant, machinery, books, design and formulae. The Income Tax Officer although referred to the decision of the Gujarat High Court in *C.I.T.* v. *Elecon Engineering Co. Ltd.* (1), but disallowed the relief of depreciation and development rebate. This is another matter which will fall for consideration.

(6) Yet another point that arises for determination is, whether for purposes of computing disallowance under section 40A(5) of the Act, the provision of rule 3(c) (ii) of the Income Tax Rules can be invoked ?

1. 96 I.T.R. 672

(7) The order of the Income Tax Officer was upheld by the Appellate Assistant Commissioner of Income Tax. On further appeal, the Income Tax Appellate Tribunal, Chandigarh gave relief to the assessee on second and third points noticed above but did not agree with the assessee on the first point. At the instance of the assessee the Tribunal has referred the following point for opinion :—

> "Whether, on the facts and in the circumstances of the case, the Tribunal erred in law in holding that the assessee was not entitled to development rebate at higher rate on reconditioned machinery worth Rs. 50,06,453?"

(8) At the instance of the revenue, the following two points have been referred for opinion :—

> "(i) Whether, on the facts and in the circumstances of the case, the Tribunal erred in law in holding that the assessee was entitled to depreciation at Rs. 1 lac capitalised towards building, depreciation and development rebate at Rs. 7 lacs capitalised towards plant and machinery and depreciation and development rebate at Rs. 2 lacs treated as a book and as such a plant ?
>
> (ii) Whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that for purposes of computing the disallowance under section 40A(5) of the Income Tax Act, the provisions of Rule 3(c)(ii) of the Income Tax Rules should be invoked ?"

(9) We first take up the question referred at the instance of the assessee.

LEGAL DATA :

(10) Under the 1922 Act, there was a provision contained in section 10(2) (vi-b) which is equal to the provision contained in section 33(1) (a). As already seen. this provision talks of new machinery or plant. In the 1922 Act there was no parallel provision for allowing development rebate for acquiring used machinery or plant and such a provision was inserted in the Act by Finance Act of 1964 with effect from 1st April, 1964.

(11) It appears that before section 33(1A) was inserted with effect from 1st April, 1964. the matter of granting development

rebate under section 33(1) (a) arose before the Central Board of Direct Taxes to give relief to the new established industrial undertakings on purchase of reconditioned machinery or plant and by circular No. 40 (XLVII-16) of 1962 dated 3rd December, 1962 from C.B.R., printed as Annexure 'J' in the paper book, it was decided that second hand machinery and plant which have been newly imported in India from abroad by an assessee may be treated as being new for purposes of grant of development rebate under section 33, subject to the conditions mentioned therein. Obviously, the decision contained in the circular was arrived at before the Finance Act of 1964, i.e., before the insertion of section 33(IA) whereunder on buying used machinery and plant also, development rebate has been allowed but at a rate less than the development rebate allowable on purchase of new machinery and plant.

(12) The first decision on the subject is of the Supreme Court in *Cochin Company* v. *C.I.T., Kerala* (2). The assessee had imported two reconditioned machines from England and claimed initial and additional depreciation thereon. The suppliers had completely stripped the machines; worn out parts replaced and the latest modifications incorporated before shipping the same to the assessee and the reconditioned machines had not been used from the time of reassembly to the date of their arrival in India. The Income Tax Officer and the other appellate statutory authorities had disallowed the deduction as they were not new. However, the Supreme Court noticed that the only facts appearing on the record were that the machines had been in use but had, immediately before import, been completely stripped and rebuilt after including replacement of worn out parts and incorporating the latest modifications and gave the following verdict :

> "The question presented for determination in this appeal is whether the two reconditioned 'Jackstone Junior Frosters Mark II' purchased by the appellant are new machines within the meaning of section 10(2) (vi) of the Income Tax Act and whether the appellant is entitled to depreciation under that sub-section. The word 'new' is not defined in the Income Tax Act. According to the Shorter Oxford Dictionary the word 'new' means 'not existing before; now made, or brought into existence, for the first time'. In the context of the language of the statute, particularly in its

(2) 67 I.T.R. 199

application to a machinery, we are of the opinion that the expression 'new' must be construed in this sense and in contradistinction and antithesis to the word 'used'. According to the statement of the suppliers there is no room for doubt that the machines were used after they were first made. Subsequently, the machines were taken into parts and were reassembled after replacing worn out parts and after incorporating the latest modification. But the question still remains whether the two machines, after being reconditioned, were entirely different from the old machinery and whether the latest improvements incorporated into them made the machines substantially new within the meaning of the sub-section. In other words, the question is whether the reconditioning of the two 'Jackstone Junior Frosters Mark II' in this case was reconstruction or substitution of the entire machinery, meaning by entirety not necessarily the whole but substantially the whole subject matter of the machinery. The question of law arising in this case must be tested in the background of this principle, but having heard learned counsel for the parties, we are not satisfied that the statements in the case are sufficient to enable us to decide the question of law raised therein. In its order dated July 1, 1959, the Appellate Tribunal has, for instance, stated that 'what had really happened was that machines of an anterior date are stripped and rebuilt incorporating the latest available technical improvements. It is not mentioned in the Tribunal's order or in the statement of the case what exactly were 'the latest available technical improvements' which were incorporated into the reconditioned machines. It is also not specified what were the dates on which the machines were first manufactured, for what period they were previously used, what were the latest technical improvements incorporated in the machines, what is the nature and cost of these improvements in relation to their nature and total cost and so on. In the absence of this material it is not possible to decide the question whether the two machines were 'new' within the meaning of section 10(2) (vi-a) of the Income Tax Act."

(13) In view of the above, the matter was remitted back to the High Court to call for a supplementary statement of the case to decide the matter afresh. According to the aforesaid dictum certain

facts have to be kept in view to find out whether a reconditioned machinery can be termed 'new' and in order to do so, it has to be seen as to when the machines were first manufactured; for what period they were previously used; what were the latest technical improvements incorporated in the machines; what is the nature and cost of these improvements in relation to their nature and total cost and so on.

(14) The next case is *C.I.T., Punjab* v. *Hindustan Milk Food Manufacturers Ltd.* (3), decided by this Court. Here also the data was not available to find out whether reconditioned machinery can be treated as new and supplementary statement of the case was called, as was done by the Supreme Court in the aforesaid case. On receipt of the supplementary statement of facts, the matter was again taken up by this Court and the decision was rendered in *C.I.T., Patiala* v. *Hindustan Milk Food Manufacturers Ltd.* (4) wherever the cost of renovation or reconditioning did not exceed the cost of the used machinery, relief was not granted to the assessee but wherever the reconditioning cost was five, six or seven times of the cost of the old machinery, relief was granted to the assessee, considering the reconditioned machinery as a new machinery.

(15) The aforesaid cases arise for consideration under the 1922 Act.

DISCUSSION :

(16) It is the admitted case of the assessee, as is clear from its letter, copy of which is Annexure 'G' in the paper book, that they had purchased second hand reconditioned plant and machinery and before reconditioning, the machines were completely knocked down, stripped and rebuilt after replacement of all worn out parts by the repairers. Again from their document, copy of which is Annexure 'H' in the paper book, it is clear that the cost of reconditioning, replacement of all worn out parts etc. was 91 per cent of the cost of the second hand used machinery and plant. That means if the value of the second hand used machinery was Rs. 100, Rs. 91 were spent in reconditioning and replacement of all worn out parts. No other data has been furnished by the assessee as to when the

(3) 84 I.T.R. 230
(4) 96 I.T.R. 278.

machines were first manufactured; for what period they were previously used and what were the latest technical improvements, if any, incorporated in the machines. In the absence of this data and keeping in view that the cost of replacement of all worn out parts and reconditioning was less than the value of the second hand used plant and machinery and on the basis of second decision of this Court in *Hindustan Milk Food Manufacturers Ltd.'s case* (*supra*) the reconditioned machinery cannot be termed new. This Court in the aforesaid case had considered only those machinery and plants to be new in which the cost of replacement of all worn out parts and reconditioning was 5 to 7 times of the cost of the second hand used machinery and wherever the cost was equal to or less than the cost of the second hand machinery, that machinery or plant was not treated as new and deduction was not allowed.

(17) On the basis of departmental circular dated 3rd December, 1962 referred to above, the counsel for the assessee wanted us to hold that every reconditioned machinery or plant, irrespective of the guidelines laid down by the Supreme Court in *Cochin Company's case* (*supra*) should be treated as a new machinery and development rebate should be granted under the provisions claimed by the assessee. Under the circular, reconditioned machinery or plant could be considered as new for the purpose of granting of development rebate under section 33, as it stood at that time, and this decision was taken keeping in view the guidelines laid down by the Supreme Court in *Cochin Company's case* (*supra*). With effect from 1st April, 1964 new provision was inserted and that new provision is section 33(1A). This provision provides for the grant of development rebate even on purchase of used machinery or plant but at a lesser rate. The learned counsel for the assessee at best could argue that for the used machinery or plant which is not reconditioned, section 33(1A) would apply and for the new as well as reconditioned plant and machinery, section 33(1) would continue to apply in view of the departmental circular referred to above. The learned counsel may be right in this submission of his, but again it cannot be laid down that every reconditioned or rebuilt second hand machinery and plant would be considered new irrespective of the guidelines laid down by the Supreme Court which were accepted by the department in view of the circular issued by it. Therefore, we have to test the facts of this case on the premises whether it can be held that the machinery on reconditioning acquired the character of being a new machinery and rebate is permissible under section 33(1) of the Act.

(18) Again adverting to the guidlines laid down by the Supreme Court, out of the four, three are missing here and we have only the cost of the second hand machinery and the cost of reconditioning which includes the cost of replacement of all worn out parts, which is in the ratio of 100:91. In view of the decision of this Court if the cost of reconditioning is equal to or less than the cost of the second hand machinery, the machinery cannot be termed new. Wherever the cost of reconditioning and replacement of worn out parts was 5 to 7 times of the cost of the second hand machinery, the reconditioned machinery was considered as new machinery. That being not the facts of the case here, we are constrained to hold that the machinery could not be considered new so as to ask for development rebate under section 33(1) of the Act. Since the assessment year in question is after the insertion of sub-section (1A) in section 33, whereunder the assessee is entitled to development rebate for used machinery, the assessee could be allowed development rebate under that provision and the Tribunal was right in allowing the development rebate at the rate permissible for the used machinery and plant under that sub-section.

ANSWER :

(19) In view of the above discussion, we answer the referred question in favour of the revenue and against the assessee in the negative and hold that the Tribunal did not err in law in allowing the development rebate at the rates permissible for the used machinery and plant.

QUESTIONS REFERRED AT THE INSTANCE OF THE REVENUE:

QUESTION 1.

(20) Definition of certain terms used in section 33, with which we are concerned, and certain other sections, is given in section 43 of the Act. Sub-section (3) defines 'plant' as follows :—

"'Plant' includes ships, vehicles, books————"

(21) Here, one item is purchase of books, designs and formulas for Rs. 2,00,000 and they all constitute books within the meaning of 'plant' and the Supreme Court in *Scientific Engineering House P. Ltd.* v. *C.I.T., Andhra Pradesh* (5), has held that they all constitute 'plant'

(5) 157 I.T.R. 86

and the assessee is entitled to development rebate as also depreciation on the value of the same. The Tribunal rightly allowed deductions to the assessee.

(22) The next item is Rs. 7,00,000 spent in obtaining technical know-how on plant and machinery. This value is also to be capitalised in the value of plant and machinery and the assessee is clearly entitled to the development rebate and depreciation on the value of the plant and machinery including the amount spent in the technical know-how of the same and the Tribunal was right in allowing the deductions.

(23) The next item is the amount of Rs. 1,00,000 spent in technical know-how in the building account. On this amount, the amount of technical know-how has been added to the value of building and on the total value only depreciation is allowable and this has been rightly allowed by the Tribunal.

(24) Before parting, one argument raised by the counsel for the revenue may be noticed. He referred to our decision in I.T.Ref. No. 90 of 1981, *C.I.T.* v. *Super Steels* (6), rendered on 1st March, 1989, for disallowing the relief on the amount spent on technical know-how. In the aforesaid case the assessee had claimed the amount spent for technical know-how as a revenue expenditure and the same was allowed to him. The learned counsel for the revenue is not prepared to accept that the amount spent in obtaining technical know-how would be revenue expenditure and according to him it would be of a capital nature and yet he wants that the relief should be disallowed to the assessee in hand.

(25) To claim as a revenue expenditure, whole of the amount of Rs. 10,00,000 would have been excluded; whereas what the assessee is wanting is that the amounts be added in the capital account and he would be allowed development rebate and depreciation on the first two items, and depreciation on the third item. In the Supreme Court case referred to above, the assessee had not claimed deduction as a revenue expenditure and had considered the expenses made for obtaining technical know-how of a capital nature and claimed depreciation and that was allowed. In this case also the assessee has claimed the amount spent in obtaining technical know-how to be of a capital nature and has claimed the deductions. As already said, to

(6) I.T.R. No. 90 of 1981 decided on 1st March, 1989

claim revenue expenditure would have been more beneficial to the assessee but in case he wants to take lesser benefit on the basis that it was in the nature of capital expense, the deduction cannot be disallowed and the argument raised on behalf of the revenue is rejected.

(26) For the reasons recorded above, we answer this question in favour of the assessee, in the negative.

QUESTION 2.

(27) This matter is covered by our decision in *C.I.T.* v. *Nuchem Plastics Ltd.* (7), rendered on 2nd February, 1989, in favour of the assessee. We had followed the decision of the Calcutta, High Court in *C.I.T.* v. *Britannia Industries Co. Ltd.* (8), in coming to the conclusion that in computing the disallowance under section 40A(5) of the Act, the provisions of rule 3(c) (ii) of the Income Tax Rules should be invoked. Today a new judgment of Gujarat High Court in *C.I.T.* v. *Rajesh Textle Mills Ltd.* (9), taking a contrary view has been cited by the counsel for the revenue. On a consideration of the matter, we prefer to follow our view recorded earlier and answer this question in favour of the assessee, in the affirmative.

The references stand disposed of with no order as to costs.

*P.C.G.*

*Before A. P. Chowdhri, J.*

SHAM KUMAR MOUDGIL,—*Appellant.*

*versus*

STATE BANK OF INDIA AND OTHERS,—*Respondents.*

*Regular Second Appeal No.* 330 *of* 1986

April 20, 1989.

*Banking Regulation Act, 1949—S. 10—Disciplinary action—Employee convicted by Trial Court for offences involving moral turpitude, however, released on probation—Bank dismissing employee in terms of S. 10 read with para 521 providing for dismissal on conviction for specified offences—Order of dismissal should be based on conduct which led to conviction and not for*

(7) I.T.B. of 1983 decided on 2nd February, 1989
(8) 135 I.T.R. 35
(9) 173 I.T.R. 179