

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:-

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN
&
THE HONOURABLE MR. JUSTICE ASHOK MENON

THURSDAY, THE 25TH DAY OF JANUARY 2018 / 5TH MAGHA, 1939

I.T.A.No.13 of 2009

AGAINST THE ORDER IN I.T.A.NO.439/COCH/2006 DATED 14.08.2008
OF THE INCOME TAX APPELLATE TRIBUNAL, COCHIN BENCH, COCHIN.
[ASSESSMENT YEAR 2003-04]

APPELLANT(S)/RESPONDENT IN I.T.A.:-

NISHANT EXPORT,
VII/179, JEW TOWN, KOCHI 2,
REPRESENTED BY ITS MANAGING PARTNER,
MR.MANISH.J.BAFNA.

BY ADVS.SRI.E.K.NANDAKUMAR [SENIOR ADVOCATE]
SRI.ANIL D. NAIR
SRI.P.BENNY THOMAS

RESPONDENT(S):-

ASSISTANT COMMISSIONER OF INCOME TAX,
CIRCLE-1, MATTANCHERRY.

BY SENIOR COUNSEL FOR GOVERNMENT OF INDIA (TAXES) SRI.P.K.R.MENON.
BY STANDING COUNSEL FOR GOVERNMENT OF INDIA (TAXES) SRI.JOSE JOSEPH.

THIS INCOME TAX APPEAL HAVING BEEN FINALLY HEARD ON 25-01-2018,
ALONG WITH I.T.A.NO.499 OF 2009, THE COURT ON THE SAME DAY DELIVERED
THE FOLLOWING:-

I.T.A.NO.13 OF 2009

APPENDIX

APPELLANT'S ANNEXURES:-

ANNEUXRE-A TRUE COPY OF THE ASSESSMENT ORDER FOR 2003-04 ISSUED BY THE
ASSISTANT COMMISSIONER OF INCOME TAX TO THE APPELLANT
DATED 30.11.2005.

ANNEUXRE-B TRUE COPY OF THE ORDER ISSUED BY THE COMMISSIONER OF INCOME TAX
(APPEALS) TO THE APPELLANT DATED 19.04.2006.

ANNEXURE-C TRUE COPY OF THE TRIBUNAL ORDER DATED 14.08.2008 ISSUED TO THE
APPELLANT.

RESPONDENT'S ANNEXURES:-

NIL.

vku/-

[true copy]

“C.R.”

K. Vinod Chandran & Ashok Menon, JJ.

I.T.A.Nos.13 of 2009 & 499 of 2009

Dated, this the 25th day of January, 2018

JUDGMENT

Vinod Chandran, J:

We are often faced with situations in which, considering an appeal under Section 260A of the Income Tax Act, 1961 [for brevity “IT Act”] on pure questions of law the assessee and the Department are both disabled in having a finality to the matter for reason of the entire questions arising in the *lis* having not been decided by the Tribunal. The instant cases are one such instance which would have warranted a remand after 10 years of the appeal pending in this Court.

2. The appellant has raised the following questions of law, in both the appeals, for our consideration and decision:

- (i) In the facts and circumstances of the case ought not the Income Tax Appellate Tribunal have held that appellant was entitled for deduction under Section 10B of the Income Tax Act 1961?
- (ii) In the facts and circumstances of the case, ought not the Tribunal have held that the conversion of ungarbled pepper to be fit for human consumption amounts to production and therefore is entitled for deduction under Section 10B of the Act?

3. The assessment years are 2003-04 and 2005-06 and the appeals before the Tribunal itself were filed in the year 2006 and 2007 respectively. The issue was as to the eligibility of the assessee to claim deduction under Section 10B of the IT Act as a hundred per cent export-oriented unit, which deduction is available to the extent of 90% of the profits and gains derived from the export business. The assessee was engaged in the procurement and export of pepper. The assessee procured un-garbled pepper, which by a process got garbled; making it fit for human consumption and was exported. The assessee had been claiming allowance under Section 80HHC for its export turnover as computed under sub-section (3); when it also had sale in the domestic market. In the relevant assessment year the assessee turned out to be a hundred per cent export-oriented unit, which is one of the conditions for claiming the benefit under Section 10B.

4. The assessee's claim for allowance under Section 10B was rejected, on two counts. One that the process involving conversion into garbled pepper was not a "manufacture" or "production" and it was only a processing which did not qualify for allowance under Section 10B. The second ground on which the disallowance was made was the reconstitution of the partnership firm, which was found to visit the assessee with consequences arising under sub-section (2) of Section 10B; disentitling them from the benefit.

5. On an appeal by the assessee, the first appellate authority, on both the grounds, found in favour of the assessee.

6. The Tribunal found that processing of un-garbled pepper into garbled would not be a “manufacture” or “production”. Since the assessee was so dis-entitled to claim deduction under Section 10B, the Tribunal did not consider the other question as to whether there was reconstruction of a business already in existence when the partnership was reconstituted.

7. The learned Counsel for the assessee has relied on the decision in ***Tata Tea Ltd. v. Assistant Commissioner of Income Tax [(2010) 234 CTR (Ker) 90]*** to contend that blending and packing of tea was held to be a “manufacture” despite; for the relevant year, the definition of manufacture which included processing was deleted from the statute.

8. The learned Senior Counsel for the Department, however, would rely on earlier Division Bench decisions of this Court in ***Deputy Commissioner of Sales Tax, Ernakulam v. Sheth Brothers [(1983) 52 STC 40 & (1983) 52 STC 41]***, which are squarely applicable on facts.

9. The issue in ***Sheth Brothers*** was whether un-garbled and garbled pepper are two different commercial commodities under the Kerala General Sales Tax Act, 1963 [for brevity “KGST Act”]. The

Court categorically held that '*whatever it be, as a matter of fact, ungarbled pepper and garbled pepper cannot be two different commercial commodities*'. In the context of a precedent on identical facts, we are inclined to answer the questions of law framed against the assessee and in favour of the Revenue.

10. The learned Counsel appearing for the assessee argued that the decision in **Sheth Brothers** was in the context of the KGST Act which may not have application under the IT Act. We are unable to countenance such a contention, especially since the finding that un-garbled and garbled pepper are not two distinct commodities was not based on any specific provision in the statute. Yet again we notice that under Section 80HHC the benefit is to any industrial undertaking carrying on 'manufacture' or 'processing'. The benefit under Section 10B is to any undertaking carrying on 'manufacture' or 'production'. Hence the statute itself recognizes the distinction between "manufacture", "production" and "processing". A manufacture or production necessarily has to lead to a different commodity while a processing may not result in a new commodity being brought out. We, hence, decline to entertain the contention as raised by the learned Counsel.

11. Apposite here would be reference to **Deputy Commr. of Sales Tax v. PIO Food Packers [(1980) 46 STC 63 (SC)]**. Therein,

the issue was whether after purchase, pineapple is washed, inedible portion removed and sliced; which slices are added with sugar as a preservative and canned under temperature and put in boiling water for sterilisation, gives rise to a different commodity. The learned Judges held so:

“On a total impression, it seems to us, the pineapple slices must be held to possess the same identity as the original pineapple fruit”.

Their Lordships relied on the following judgment and the extracts which are shown hereunder:

“Referring to *Anheuser-Busch Brewing Association v. United States* [52.L.Ed.336, 338, the court said:

“Manufacture implies a change, but every change is not manufacture, and yet every change in an article is the result of treatment, labour and manipulation. But something more is necessary There must be transformation; a new and different article must emerge, 'having a distinctive name, character or use'.”

And further:

“At some point processing and manufacturing will merge. But where the commodity retains a continuing substantial identity through the processing stage we cannot say that it has been 'manufactured'.”

The process of garbling to make pepper edible does not give rise to a different commodity distinct from the raw pepper purchased.

12. However, before leaving the matter, we have to notice that if the decision was otherwise, then there would have been a

remand necessitated for considering whether the reconstitution of the firm dis-entitles the assessee from claiming relief under Section 10B. Hence, it would always be ideal for the Tribunal to consider the entire issues arising in an appeal, so that the parties can have a quietus to the matter. As we have noticed earlier, the appeal, on questions of law, is being considered after a decade-and-a-half from the assessment year. If the final fact finding authority, the Tribunal, has not considered the entire questions arising on facts, then a remand would be necessitated which would drag on the matter for another decade.

In the context of the questions of law raised by the assessee having been answered against the assessee, the instant appeals are rejected. No costs.

Sd/-
K.Vinod Chandran
Judge

Sd/-
Ashok Menon
Judge

vku/-

[true copy]