

HIGH COURT OF ANDHRA PRADESH

Commissioner of Income-tax

v.

Prasad Films Laboratories (P.) Ltd.

M.N. RAO AND T.N.C. RANGARAJAN, JJ.

CASE REFERRED NO. 68 OF 1995 AND IT CASE NO. 50 OF 1996

NOVEMBER 14, 1996

S.R. Ashok for the Applicant. **C. Kodendar Ram** for the Respondent.

ORDER

1. The admitted facts stated in this case are as follows :

The assessee is a company engaged in the business of printing and processing of cinematographic films. The Tribunal has found that the actual process carried out by the company was to develop exposed cinematographic film and make positive prints which are ready for exhibition. In the proceedings for the assessment year 1984-85 corresponding to the previous year ended 30-6-1983, the assessee did not claim any investment allowance. The assessment was declared as 'N.A.' (not assessable) determining the net loss at Rs. 94,175 and carrying forward unabsorbed depreciation of Rs. 4,65,918. The assessee thereafter filed an application for rectifying the assessment stating that by inadvertence it had omitted to claim investment allowance on electrical installations, voltage stabilizers, and air-conditioning plants used in the said business of developing and processing the cinematographic film and it should be allowed. This claim was rejected on the ground that there was no mistake apparent from the record. Simultaneously for the assessment years 1986-87 and 1988-89, the assessee made claims for grant of investment allowance in respect of the same machinery. The ITO while making assessment for those assessment years rejected the claim on the ground that the said items do not form part of plant and machinery and the business activity falls within item 9 of XI Schedule of the Income-tax Act, 1961 ('the Act'), being an item not entitled to investment allowance. This decision was confirmed on appeal by the Commissioner who rejected all the appeals and for the assessment year 1984-85 not only on this ground but also on the ground that there was no mistake apparent from the record.

When all the three assessments came up on further appeal to the Tribunal, the Tribunal held that what was ineligible was only the manufacture of cinematographic film, which according to the Tribunal, could not refer to the processing of exposed cinematographic film. The Tribunal also held such processing amounted to manufacture because the assessee produced an article which was different from the raw material. With reference to the assessment year 1984-85, the Tribunal also found that there being no profit in that year the assessee could always claim the deduction in the subsequent year and the matter of computing the admissible investment allowance was only an omission which could be rectified.

2. The revenue raised the following questions :

"Assessment year 1986-87

1. Whether, on the facts and in the circumstances of the case, the Tribunal was correct in relying on the decision of the Tribunal, Madras in the case of *Prasad Productions (P.) Ltd.* in IT Appeal Nos. 1831 and 1832 (Mad.) of 1984 dated 29-5-1985 wherein it was held that a feature film was different from a cinematograph film, particularly when the feature film is covered under the Cinematograph Act?
2. Whether, on the facts and in the circumstances of the case, the Tribunal was correct in allowing investment allowance to the assessee, particularly when it was covered by item Nos. 9 and 10 of XI Schedule to the Income-tax Act, 1961 ?

3. Whether, on the facts and in the circumstances of the case, the Tribunal was correct in concluding that processing of colour films used in cinema through hypo solution which absorbs the silver content of the film and drying, etc., amounts to manufacture and the ratio of the Supreme Court's decision in the case of *CIT v. N.C. Budharaja & Co.* [1993] 204 ITR 412 / 70 Taxman 312 is not applicable to the facts of the case ?
4. Whether, on the facts and in the circumstances of the case, the Tribunal was correct in directing allowance of investment allowance on voltage stabilizer, electrical equipment, projector and air- conditioner treating them as plant and machinery in the assessee's business of processing of colour films, even though cinematograph films and projectors are included under item No. 9 of XI Schedule to the Income-tax Act, 1961 ?

Assessment years 1984-85 and 1988-89

1. Whether, on the facts and in the circumstances of the case, the Tribunal was correct in holding that there was a mistake apparent from record in the order of the Assessing Officer for the assessment year 1984-85 and, thus, allowing investment allowance ?
 2. Whether, on the facts and in the circumstances of the case, the Tribunal was correct in relying on the decision of the Gujarat High Court in the case of *Chokshi Metal Refinery v. CIT* [1977] 107 ITR 63 in allowing the assessee's appeals, particularly when the facts of the above case were distinguishable ?
 3. Whether, on the facts and in the circumstances of the case, the Tribunal was correct in relying on the decision of the Tribunal, Madras in the case of *Prasad Productions (P.) Ltd.* in IT Appeal Nos. 1831 & 1832 (Mad.) of 1984 dated 29-5-1985, wherein it was held that a feature film was different from a cinematograph film, particularly when the feature film is covered under the Cinematograph Act ?
 4. Whether, on the facts and in the circumstances of the case, the Tribunal was correct in allowing investment allowance to the assessee, particularly when it was covered by item Nos. 9 and 10 of XI Schedule to the Income-tax Act, 1961 ?
 5. Whether, on the facts and in the circumstances of the case, the Tribunal was correct in concluding that processing of colour films used in cinema through hypo solution which absorbs the silver content of the film and drying, etc., amounts to manufacture and the ratio of the Supreme Court's decision in the case of *N.C. Budharaja & Co.'s case (supra)* is not applicable to the facts of the case ?
 6. Whether, on the facts and in the circumstances of the case, the Tribunal was correct in directing allowance of investment allowance on voltage stabilizer, electrical equipment, projector and air- conditioner treating them as plant and machinery in the assessee's business of processing of colour films, even though cinematograph films and projectors are included under item No. 9 of XI Schedule to the Income-tax Act, 1961 ?"
3. The Tribunal, however, referred only the following questions :

"For all the three years

1. Whether, on the facts and in the circumstances of the case, the Tribunal was correct in relying on the decision of the Tribunal, Madras in the case of *Prasad Productions (P.) Ltd.* in IT Appeal Nos. 1831 & 1832 (Mad.) of 1984 dated 29-5-1985, wherein it was held that a feature film was different from a cinematograph film, particularly when the feature film is covered under the Cinematograph Act ?
2. Whether, on the facts and in the circumstances of the case, the Tribunal was correct in directing allowance of investment allowance on voltage stabilizer, electrical equipment, projector and air- conditioner treating them as plant and machinery in the assessee's business of processing of

colour films, even though cinematograph films and projectors are included under item No. 9 of XI Schedule of the Income-tax Act, 1961 ?

Only for assessment year 1984-85

1. Whether, on the facts and in the circumstances of the case, the Tribunal was correct in holding that there was a mistake apparent from record in the order of the Assessing Officer for the assessment year 1984-85 and, thus, allowing investment allowance ?

Only for assessment year 1988-89

1. Whether, on the facts and in the circumstances of the case, the Tribunal was correct in upholding the allowance, the unabsorbed investment allowance, pertaining to the assessment years 1984-85 and 1985-86 brought forward and claimed by the assessee during the assessment year 1988-89 ?"

4. The revenue has, therefore, filed IT Case No. 50 of 1996 for a direction to refer the questions which have not been referred by the Tribunal. We find that in reference applications, questions are generally not properly framed by the revenue and while referring the matter also the issues are not properly focussed by reframing the questions. When the questions raised are repetitious, and similar to grounds of appeal, the Tribunal refers one or two of them and leaves the rest as in the present case, while the revenue insists on the other questions being also referred. In this exercise, both sides as well as the Tribunal overlooked the need to focus the issues. A perusal of the facts narrated above will indicate that only two issues actually arise in the case, namely; whether item 9 of Schedule XI is a bar to the claim of the assessee for investment allowance, and whether for the assessment year 1984-85, the assessee could make a claim by way of a rectification application.

5. In the circumstances, we are of the opinion that the Tribunal ought to have reframed the questions and referred the case. We, therefore, reframe the questions in the following manner before we answer the issues :

"1. Whether, on the facts and in the circumstances of the case, the assessee was entitled to investment allowance under section 32A of the Income-tax Act, 1961 in respect of electrical installations, air-conditioning plant and voltage stabilizer installed in its laboratory on the ground that the assessee was not engaged in the manufacture of cinematograph films as specified in item No. 9, XI Schedule of the Act ?

2. Whether, on the facts and in the circumstances of the case, the assessee was entitled to make a claim for investment allowance for the assessment year 1984-85 by way of rectification application after the assessment was closed as N.A. ?"

With reference to the first question, it was argued by the learned standing counsel that the words 'cinematograph film' must be understood with reference to the legislation on that subject and in that approach it would be found that the end-product of the assessee's business was cinematograph film, and, therefore, the assessee was not entitled to the investment allowance. On the other hand, it was contended on behalf of the assessee that the words 'cinematograph film' should be given the meaning in common parlance as 'raw film' which is required to be manufactured and it could not refer to certain processes taking place with the raw film itself as the input. It was further submitted that even if cinematograph film is understood as the motion picture, manufacture of that motion picture ended with exposing the raw film and the processing that take place after that, particularly with reference to the production of positive prints from the negative will be outside the scope of that expression.

6. Section 32A of the Act provides for the grant of investment allowance as a deduction of an amount equal to 25 per cent of the actual cost of the new machinery or plant in respect of the previous year in which the machinery or plant was acquired or first put to use. Sub-section (2)(b)(iii) provides that the said machinery or plant shall be that installed in any 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 XI Schedule. At the relevant time, item 9 of the XI Schedule was 'cinematograph films and projectors'. Sub-section (3) of section 32A provides for carrying forward unabsorbed investment allowance where the income of the previous year is either *nil* or less than the admissible investment allowance.

A reading of these provisions indicates that an assessee will not be entitled to investment allowance if it is engaged in the business of manufacture or production of cinematograph film.

7. It is well-established that the words used in the statute dealing with the matters relating to general public are presumed to have been used in their popular sense, that is, according to the common understanding. But this doctrine is not applicable to the technical words which are used only in their technical sense. In any case, the meaning of those words unless there is anything contrary in the context can be ascertained from the legislation relating to that subject itself. In the present case, we find that the meaning of cinematograph film remains the same both in the popular sense as well as in the technical sense. The *Chambers Twentieth Century Dictionary* defines cinematograph as an apparatus for projecting a series of instantaneous photographs so as to give a moving representation of a scene, with or without reproduction of sound. A film is defined as a sheet or ribbon of celluloid or the like prepared with such a coating for ordinary photographs or for instantaneous photographs for projection by cinematograph: a motion picture, or connected series of motion pictures setting forth a story.

8. Entry 60 in list-I of the VII Schedule to the Constitution of India is "sanctioning of cinematograph films for exhibition". Under this Entry, the Cinematograph Act, 1952, has been enacted. Section 2(c) defines the cinematograph as follows :

"(c) 'cinematograph' includes any apparatus for the representation of moving pictures or series of pictures;"

Section 2(dd) of the Act defines the film as follows :

"(dd) 'films' means a cinematograph film;"

Similarly, the Copyright Act, 1957, defines 'cinematograph film' in section 2(f) as follows :

"(f) 'cinematograph film' includes the sound track, if any, and 'cinematograph' shall be construed as including any work produced by any process analogous to cinematography;"

A comparison of these definitions with the dictionary meaning indicates that both in common parlance and in technical language, the words 'cinematograph film' refers to a film containing picture and sound fit for exhibition and which is generally referred to as a feature film in the field of entertainment. Such cinematograph films are produced by exposing raw films and developing the same to yield a negative. The positive prints are thereafter made by using the negative film as the base for the purpose of exhibition of the picture through a projector.

9. In considering the scope of the restriction contained in section 32A(2)(b)(iii), we have to consider whether the process by which the assessee makes positive prints from the negative could be taken as part of manufacture or production of a cinematograph film. There is no doubt that the production of a negative, by exposing the raw film and recording the pictures and sound track thereon, would amount to the production of a cinematograph film. That process should also include developing the exposed film to have the negative or the master film. But when the positive prints are made from the master negative, as pointed out by the Tribunal, and cinematograph film which was already produced is the raw material, it cannot be said that there is a production of a cinematograph film inasmuch as such cinematograph film was already produced with reference to the negative, and making of positive film is only a process of duplication.

10. We may also look at this matter from the point of view of legislative intent. Para 22 of the memoranda explaining the provisions of the Finance (No. 2) Bill, 1977, which introduced section 32A,

states that the exclusion of certain items from the operation of section 32A is on the basis of articles and things of low priority - 3 ITR (St.) 20. We find that the words 'cinematograph film' were omitted from item 9 of Schedule XI by the Finance Bill, 1988. The memoranda explaining this, states "the item that falls under the head 'Cinematograph films' caters to the priority needs of the country in various vital fields like medicine, communication and education. It is, therefore, proposed to exclude cinematograph films from the non-priority list of articles or things from the Eleventh Schedule. 'Projectors' would continue to be included as an item in the Schedule" - 170 ITR (St.) 166. This also indicates that the words 'cinematograph film' referred to exposed and developed negative film containing pictures and sound track used for preparation of positive prints which can be exhibited. Since such films which are called feature films in the field of entertainment may also be educative and technical, it was removed from the low priority category. A reference to the depreciation table in the Income-tax Rules, 1962 shows that this was the film that was envisaged because of the item 'C' in Category-III of Part-I which states as follows :

"Cinematograph films-Machinery used in the production and exhibition of cinematograph films (N.E.S.A.) :

(a) Recording equipment, reproducing equipment, developing machines, printing machines, editing machines, synchronisers and studio lights except bulbs."

All the machinery referred to therein are such as are necessary for producing the film in the sense of incorporating the pictures and sound track on to the raw film. Once such an incorporation of the pictures and sound track on the raw film is over, the production of the cinematograph film is completed. The Madras High Court in the case of *CIT v. Prasad Productions (P.) Ltd.* [1989] 179 ITR 147/ 45 Taxman 95 observed as follows :

". . . The purpose of obtaining positive prints is to exhibit the film produced which is a stage after the completion of the production. In any given case, a person carrying on business in the production of feature films may produce a film, but for a variety of reasons, he may not be in a position to exhibit it by obtaining positive prints. Having produced a film, the person carrying on the business of production of feature films may either keep them without exhibition or even part with them without making arrangements for their exhibition. It cannot, therefore, be assumed that in all cases of production of a film, the producer must necessarily obtain the positive prints of the film as well. In other words, if a person carries on the business of production of films, he may not only produce the films but also prepare the positive prints for the purpose of exhibition or he may not take steps for the exhibition of the film having produced it. The production and exhibition of a feature film constitutes two distinct and separate stages and while the former would take in all activities which culminate in the production of a feature film, the latter contemplates a stage subsequent to the completion of the production of the film, viz., exhibition of the film produced. . . ." (p. 156)

11. We are of the opinion that the process of making positive prints from the negative so made is an independent activity which cannot be called as production of cinematograph film but rather falls in the category of a duplication process. Though the raw film may again be used for making the prints, the base material is the negative and not the scenes and sounds recorded with the equipment such as those referred in the depreciation table.

Even though the development of an exposed film to produce a negative could be an ultimate step in the production of a cinematograph film, the Tribunal has taken the view that that process could not be regarded as part of the production of the cinematograph film because as far as the assessee, who is undertaking that process, is concerned, the raw material is the exposed film and not a raw film. This view is somewhat debatable because as we have observed earlier the production of cinematograph film would be complete with the making of the negative and developing exposed film is part of that process and cannot be separated from it. However, sub-section (2)(b) of section 32A states that if an assessee is engaged mainly in the manufacturing production of an article not included in the Schedule, it shall not

be denied the allowance only because the machinery installed is also utilised in the manufacturing of an article in Schedule XI. In the present case, it is stated that the main business of the assessee is to make the positive prints from negative prints and, therefore, the fact that occasionally exposed films are also developed will not disqualify the assessee from claiming the allowance.

12. The revenue took another objection to the extent that the claim of the assessee stating that the processing of cinematograph film for obtaining positive print cannot be regarded as manufacture or production of an article as it amounted only to the processing of an article which remains a cinematograph film before another process was carried out. The Supreme Court has repeatedly held that the test for determining whether manufacture can be said to have taken place is whether the commodity which is subject to the process of manufacture can no longer be regarded as the original commodity but is recognised in the trade as a new and distinct commodity - see *CIT v. N.C. Budharaja & Co.* [1993] 204 ITR 412, 414/ 70 Taxman 312. The Supreme Court also observed the word 'production' has a wider connotation and takes in bringing into existence new goods by a process which may or may not amount to manufacture. Applying these tests, the Tribunal has found that by the process carried out by the assessee, the raw films without images and sound, have been converted into films with images and sounds, which is certainly a new and distinct commodity well-known in the trade as positive print quite different from raw films. We, therefore, uphold the decision of the Tribunal overruling this objection. The other objection which is implicit in the questions raised was that voltage stabilizer, electrical equipment and air-conditioner could not be treated as plant and machinery. But this objection has only to be stated to be rejected because admittedly these items have been granted depreciation treating them as plant and machinery actually used in the business of the assessee. Since the assessee has been found to be engaged in the business of the manufacture of production of an article which does not fall within the scope of item 9 of Schedule XI, we have to uphold the order of the Tribunal granting investment allowance in respect thereof. Our answer to the first question as reframed by us is in the affirmative and in favour of the assessee and against the revenue.

12. With regard to the second question, as the Tribunal has found that for the assessment year 1984-85, the assessment was completed as 'N.A.' and since the assessee did not have profit in that year, the investment allowance had to be computed only for the purpose of being carried forward. Therefore, the rectification was sought only to make good the omission to make a claim for investment allowance. The Tribunal also noted the observations of the Gujarat High Court in *Chokshi Metal Refinery v. CIT* [1977] 107 ITR 63 which held that the CBDT itself had cast the responsibility on the ITO to draw the attention of the assessee to the relief to which the assessee was clearly entitled but which the assessee had omitted to claim. That omission also was not a bar to the assessee making the claim in the year in which there was a profit because the Supreme Court has held in *CIT v. Manmohan Das* [1966] 59 ITR 699 that a decision by the Assessing Officer who deals with the first year's assessment that the assessee cannot carry forward the loss to the next year is not binding on the assessee in the computation of the taxable income for the subsequent year in which there is a profit. We are, therefore, of the opinion that this objection of the revenue is frivolous. This question is, accordingly, answered in the affirmative in favour of the assessee and against the revenue.

13. In view of our answers to the two questions as reframed by us, we see no reason to direct the Tribunal to refer the questions which were not referred by the Tribunal. The income-tax case is, therefore, dismissed.