

(1994) 07 RAJ CK 0075

In the Rajasthan High Court

Case No : Income Tax Reference No's. 51 of 1988 and 29 of 1989

Agarwal Industries

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 21-07-1994

Acts Referred:

Income Tax Act, 1961 — Section 43, 80J, 80J(1A)

Citation : (1995) 211 ITR 30

Hon'ble Judges : V.K. Singhal, J;V.G. Palsikar, J

Bench : Division Bench

Advocate : Vineet Kothari, for the Appellant; D.S. Shisodia and Sandeep Bhandawat, for the Respondent

Judgement

V.K. Singhal, J.—These two references are disposed of by this judgment, since the questions involved are common.

2. Reference No. 29 of 1989 is in respect of the assessment year 1983-84 and Reference No. 51 of 1988 is in respect of the assessment year 1984-85. The Income Tax Appellate Tribunal has referred the following two questions arising out of its order, which are common in both the years:

"1. Whether the Tribunal was right in holding that till the period of five years from the date of grant of the subsidy is not completed its nature is that of a loan from the Government ?

2. Whether the Tribunal was right in coming to the conclusion that deduction u/s 80J on the subsidy amount would not be available as the said amount was not the assessee's own capital contribution?"

3. The brief facts of the case are that the Income Tax Officer deducted the amount of subsidy for the purpose of granting various deductions on account of depreciation, investment allowance and deduction u/s 80J. According to the Income Tax Appellate Tribunal, the grant of subsidy to an undertaking was subject to the condition that it must continue production at least for a period of

five years after it has commenced production. If the condition is not fulfilled, the Government have the right to enforce recovery of the said subsidy. On failing to comply with the conditions the subsidy no longer remains a grant, but would become a liability. The assessee is entitled to the relief u/s 80J on the amount that he has contributed by way of his capital. The subsidy received was considered as not forming part of the opening balance and is not capital contributed by the entrepreneur. It was considered to be a loan till the period of five years from the date of grant of subsidy lapses within which period the Government have the right to recover the subsidy in case the industry fails to fulfil the conditions laid down for the grant of the subsidy. In respect of the subsidy received during the year, it was observed that the same cannot be reduced from the opening balance as for the purpose of calculation of deduction, the figures as in the opening date are only to be considered. The amount of subsidy which is outstanding on the opening date of the accounting year was directed to be deducted for the purpose of computing the deductions u/s 80J.

4. We have considered over the matter. With regard to the provisions of Section 80J, the deduction is available on the capital employed in the industrial undertaking. It has been held by the apex court in *Lohia Machines Ltd. and Another Vs. Union of India (UOI) and Others*, that borrowed money and debts due cannot be included in the capital employed. Rule 19A has contemplated exclusion of borrowed monies and debts due. This court in *Commissioner of Income Tax Vs. Ambica Electrolytic Capacitors Pvt. Ltd. and Others*, has held that the subsidy or investment subsidy given by the Government which is for development of industries in selected backward districts/areas cannot be deducted from the actual cost for giving the benefit of depreciation or investment allowance. It was further observed that, as a matter of fact, the subsidy is a grant for encouraging entrepreneurs to come forward and develop the backward areas. As such, it cannot be deducted from the cost of the assets to the assessee for denying the benefit of depreciation or investment allowance.

5. Sub-section (1A) of Section 80J was inserted by the Finance Act (No. 2) of 1980, with retrospective effect from April 1, 1972. It has provided that for the purpose of this section the capital employed in an industrial undertaking shall be computed in accordance with Clauses (II) to (IV). Clause (II) provides as under :

"(II) The aggregate of the amounts representing the values of the assets as on the first day of the computation period of the undertaking or of the business of the hotel to which this section applies shall first be ascertained in the following manner :

"(i) in the case of assets entitled to depreciation, their written down value ;

(ii) in the case of assets acquired by purchase and not entitled to depreciation, their actual cost to the assessee ;

(iii) in the case of assets acquired otherwise than by purchase and not entitled to depreciation, the value of the assets when they became assets of the business ;

(iv) in the case of assets, being debts due to the person carrying on the business, the nominal amount of those debts ;

(v) in the case of assets, being cash in hand or bank, the amount thereof.

Explanation 1.--In this clause, "actual cost" has the same meaning as in Clause (1) of Section 43.

Explanation 2.--In this clause and in Clause (iii), "computation period" means the period for which profits and gains of the industrial undertaking or business of the hotel are computed under Sections 28 to 43 A.

Explanation 3.--In this Clause and in Clause (V), "written down value" has the same meaning as in Clause (6) of Section 43."

6. The Explanation to Clause (II) makes it clear that actual cost has the same meaning as has been given in Clause (1) of Section 43. From the judgment given above by this court, it is clear that the subsidy granted is an incentive for setting up of industries in backward areas and, it was with a view to attract entrepreneurs to set up industries in backward areas, so that those areas may be developed. The basis for grant of subsidy was the cost of the fixed assets of the new unit and it was to encourage the entrepreneurs. The subsidy was not with reference to a particular asset and beyond a certain limit, it was not payable even if the entrepreneur has invested more than the said limit. It is true that, if the compliance with the scheme for grant of subsidy is not made, it was capable of being withdrawn. The manner in which the subsidy granted has to be utilised has not been envisaged in the scheme. The provisions of Sub- Section (1A) of Section 80J have contemplated that the aggregate of the amounts representing the values of the assets as on the first day of the computation period of the undertaking shall first be ascertained in the manner given therein. In the case of assets acquired by purchase entitled to depreciation their written down value has to be taken ; and in the case of assets acquired by purchase and not entitled to depreciation, their actual cost to the assessee has to be taken. The word "actual cost" has been assigned the same meaning as in Clause (1) of Section 43. Since the amount of subsidy cannot be attributed to any particular asset, the actual cost thereof would be without deducting the subsidy. Besides this, the expressions "borrowed monies" and "debts due" have different meanings, which are to be excluded from the capital employed. The subsidy cannot be considered to be borrowed money or a debt due. In a situation where there is contravention of any of the provisions of the scheme granting the subsidy and the said subsidy is withdrawn, it is, therefore, only at that stage that it could be excluded from the capital employed. The taxing authorities could rectify/reassess at that stage. The words "borrowed money" and "debts due" by the assessee which are to be excluded contemplate the existence of a third party from which the money is borrowed or to which the debt is due. The subsidy can neither be considered as borrowed money nor a debt due. Therefore, we are of the opinion that it cannot be excluded for the purpose of computation of deduction u/s 80J. In view of this

interpretation, it is held that the Income Tax Appellate Tribunal was not justified in holding that till the period of five years from the date of grant of the subsidy is completed, its nature is that of a loan from the Government. The Tribunal was also not justified in coming to the conclusion that deduction u/s 80J on the subsidy amount would not be available as the said amount was not the assessee's own capital contribution. Accordingly, the references are answered in favour of the assessee and against the Revenue.