(1996) 03 KL CK 0008

In the High Court Of Kerala

Case No : OP No. 18970 of 1995

ASIAN TECHS LTD. APPELLANT

Vs

COMMISSIONER OF INCOME TAX. RESPONDENT

Date of Decision : 26-03-1996

Acts Referred:

Constitution of India, 1950 — Article 141
Income Tax Act, 1961 — Section 254, 32A, 80HH, 80I, 80J

Citation : (1997) 138 CTR 158

Hon'ble Judges : V. V. Kamat, J

Bench : Division Bench

Judgement

V. V. KAMAT, J. :

This petitioner has a grievance against rejection of the reference application by the order dt. 8th Nov., 1994 of the Tribunal (Ext. 9). The petitioner wants a direction for reference as regards the following 4 questions :

"(i) Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the assessee is not entitled to the benefit of ss. 80J and 80HH of the IT Act, 1961, in respect of the profit referable to the articles, products or things manufactured by it in the course of its construction ?

(ii) Whether, on the facts and in the circumstances of the case, the Tribunals refusal to afford an opportunity to the assessee to produce the details called for by it for the first time at the hearing on 7th Dec., 1993, amounts to a violation of the principles of natural justice which vitiates the appellate order ?

(iii) Whether, on the facts and the circumstances of the case, having considered the entitlement of the assessee to the benefits under ss. 80J and 80HH of the IT Act, 1961, in respect of the profits referable to the articles, products or things manufactured by the assessee in the course of its construction activities, which issues were left open by the Supreme Court in Commissioner of Income Tax, Orissa and Others Vs. N.C. Budharaja and Company and Others, , the Tribunal was justified in requiring the assessee to immediately produce the details of such profits especially when the AO himself had not applied his mind to this aspect and for which reason the Tribunal had in the appellate orders of the assessees 1983-84 and 1985-86 assessments remanded the case back to the AO to quantify the eligible deduction under ss. 80J and 80HH of such profits ?

(iv) Whether, on the facts and in the circumstances of the case, the Tribunal was right in finding, after having held in the appellate orders for assessment years 1983-84 and 1985-86 following the decision in R. M. Enterprises vs. First ITO (1992) 43 TTJ (Bom) 165 : (1993) 199 ITR 40, that the assessee is not entitled to the benefits under ss. 80J and 80HH of the IT Act, 1961, in respect of the profits referable to articles manufactured in the course of its construction activities, that a similar claim for the year is only an argument developed in view of the observations of the Supreme Court in CIT vs. N. C. Budharaja & Co. (supra) ?".

The assessee is a company incorporated as per the Companies Act, 1956, and is engaged in the business as engineers, contractors, consultants, etc. The year in question is 1984-85 in regard to which, particularly an item with reference to ss. 32A, 80J and 80HH of the IT Act, 1961. (sic)

2. The present proceedings of the petition relate to the deduction under ss. 80J and 80HH of the Act. Reading of the two statutory provisions would show manifold points of similarities which are conditions required to be complied to enable the assessee to claim deduction thereunder. There are certain special aspects of differences in the two provisions. Whereas s. 80HH relates to new industrial undertakings (in the context of the present proceedings), in the backward areas, s. 80J covers other areas not covered by the earlier provision. Obviously, as a result of this difference in situation the requirements show difference with regard to the percentages of deduction, period for which the deductions can be claimed and other aspects which can be understood as necessary differences arising out of legislative considerations dealing with different situations, although requirement of following certain conditions show an element of similarity in regard thereto. These general conditions are required to be fulfilled and it is only on and after satisfaction thereof there can be a thought of consideration of deduction thereunder. The conditions are available in s. 80HH (sub-s. 2) and s. 80J (sub-s. 4) of the Act. The first requirement is that the concerned industrial undertaking is not formed by splitting up or reconstruction of the business already in existence. The second condition is that it is not formed by a transfer to a new business of machinery or plant previously used for any purpose whatsoever. The third condition relates to the commencement of production and that is with reference to s. 80J of the Act as well as s. 80HH. It states that the commencement of manufacture or production of articles before the specified date as specified independently in the section requires satisfaction with reference to any particular industrial undertaking. The fourth condition is the requirement of employees with reference to the industrial undertaking and in

regard to this specific number of employees find mention in the two provisions.

3. Therefore, the assessee invoking provisions of ss. 80J and 80HH of the Act has to satisfy compliance of the conditions generally specified hereinbefore.

4. It appears that by the assessment order dt. 24th March, 1987, the claim for deduction as specified hereinbefore was rejected and the reasoning appears to be that it was because the claim was rejected in the prior assessments based on the same arguments.

5. Further travel of the proceedings for the year in question (84-85) granted a partial relief to the assessee to the extent of s. 32A of the Act. The appellate authority in regard to the claims based on ss. 80J and 80HH followed the same reasoning that the rejection of the claim for the earlier years would be the rule of the situation. This was by the order dt. 16th Oct., 1987.

6. There is a stop in the narrative disturbing the link. It appears that with regard to asst. yrs. 1983-84 and 1985-86, the proceedings were before the Tribunal and by the order dt. 4th June, 1993 and 27th Aug., 1993 respectively the Tribunal followed the decision of the Tribunal Bench in R. M. Enterprises vs. First ITO (1992) 43 TTJ (Bom) (SB) 165 : (1993) 199 ITR 40 and held that the assessee with regard to those years would be entitled to get deduction with regard to the claim under ss. 80I and 80HH. This was in respect of the profits referable to manufacture of any article, product or thing in the course of its construction activity.

7. The narration takes us further to the decision of the apex Court dt. 7th Sept., 1993 in Commissioner of Income Tax, Orissa and Others Vs. N.C. Budharaja and Company and Others, where the question of claim for deduction of assessees who were contractors came up for consideration in the matter of construction of a dam and with reference to the work in the process undertaken by the concerned assessees whether could be considered as constituting an industrial undertaking and in connection whether the benefit of the provisions could be made available to them to claim deductions. The apex Court ruled that it is for determining whether manufacture can be said to have taken place is whether the commodity which is subjected to the process of manufacture can no longer be regarded as the original commodity but is recognised in trade as a new and distinct commodity. In the process of discussion reasoning proceeds further with the expression manufacture and production are normally associated with movables - articles and goods, big and small - but they are never employed to denote construction activity of the nature involved in the construction of a dam or a building. In the sense the word article must be understood in its normal connotation - the sense in which it is understood in the commercial world and, therefore, it is yet to keep in mind, since a word takes its colour from its context and therefore, it cannot comprehend or take within its ambit a dam, a bridge, a building, a road, a canal and so on. The apex Court has made it clear in the course of the judgment that the question as to whether the work undertaken

could be characterised as an industrial undertaking was not being considered as no arguments were advanced for the Revenue questioning the view taken by the High Court. With regard to the role of the contractor in the context of the expressions manufacture and produce, after a resume of decided cases in regard thereto it is observed that manufacture is the end result of one or more processes through which the original commodity is made to pass and it is only when the change or a series of changes take the commodity to a point where commercially it can no longer be regard as the original commodity but instead is recognised as a new and distinct article that a manufacture can be said to take place.

8. Similarly the apex Court considered the word production or produce and observed that in the process of the by-products, intermediate products and residual products show their emergence.

9. It is in this process of reasoning, the apex Court has observed a hypothetical situation that it may be that the respondent himself is manufacturing some of the articles like gates, windows, doors which go into the construction of a dam but that makes little difference to the principle, because the petitioner is not claiming the deduction provided on the value of the said manufactured articles, on the total value of the dam as such making it immaterial and irrelevant to find out whether such articles are manufactured by him alone or are purchased by him from some other person. Naturally the apex Court has observed that it was not called upon to express any opinion on the question. The petitioner-assessee felt and accordingly as averred in the petition that the apex Court left the question for claim of a deduction in respect of profits referable to article or things manufactured in the course of construction of dams, bridges, roads and canals, etc.

10. It is already seen that the apex Court was not required to consider this hair splitting situation.

11. The proceedings for the assessment year in question (1984-85) came up before the Tribunal and by the order the Tribunal also considered the situation. Each assessment year is a separate unit and there is no continuation for review or reopening, also there is a statutory period of limitation under s. 254(2) of the Act. It is submitted by the petitioner in the petition by averment that as the Tribunal with regard to the asst. yrs. 1983-84 and 1985-86 had held that the applicant was so entitled, the said decision ought to have been followed. It is also submitted that the Tribunal ought to have remanded the matter to find out the quantum of entitlement which was not done by the AO but had disallowed the claim by his order. The said order is at Ext. P5. The Tribunal has taken the view in the light of the above decision of the apex Court [Budharajas case (supra)] that the assessee is not entitled to the claim for benefit available under the statutory provisions of ss. 80J and 80HH of the Act.

12. It was before the Tribunal that it was right to be argued effectively and with

force on the basis of the observations of the apex Court (referred to as found at page 424 of the said decision) with regard to the prayer for remand. The Tribunal has given its reasons in the following manner :

"the Bench wanted to know the list of articles or things manufactured by the assessee and the cost of such articles, if any. The Bench further wanted to know whether at least the contracts under which the work was undertaken by the assessee was on the basis of cost plus, and if so the cost of such articles and the profit relatable thereto. The learned advocate was unable to furnish the details but pleaded for an adjournment. This case has seen several adjournments, first on 18th Jan., 1993, second on 31st March, 1993, third on 9th Sept., 1993 and we are not inclined to grant any further adjournments."

It would thus be seen that the Tribunal, as bound has followed the law declared by the Supreme Court, in accordance with the spirit of Art. 141 of the Constitution of India.

13. We have already stated that the application for reference has been rejected, accepting the contention of the Revenue that the decision of the apex Court in Budharajas case (supra) would rule the situation.

14. Earlier judgment dictated by my brother (P. A. Mohammed, J.) before the recess in OP 397/1996 having examined the situation we have already held that the decision of the apex Court rules the situation, in regard to the claim for deduction under ss. 80J and 80HH of the IT Act, 1961.

15. Learned counsel for the assessee strenuously submits that the anomalous situation has always to be avoided by the Court. He pointed out that with regard to the asst. yr. 1983-84 reference has been called for and, therefore, the said course should be followed by us. The learned counsel also submitted that the Tribunal did not grant opportunity to the assessee to place the material on record in the light of the observations of the apex Court (refer to supra) relating to the aspect of deduction with regard to manufacturing some of the articles like gates, windows, doors which go to the construction and to place material in regard thereto.

16. In the first instance, after carefully going through all the orders we do not find even a semblance of a pleading with regard to the contention of such a nature. We also do not find necessary factual matrix which is really required to enable the assessee to claim benefits of ss. 80J and 80HH of the Act. In order to satisfy ourselves we also showed our anxiety to see the material because ultimately the question is as to whether the assessee is entitled to claim deduction under the statutory provisions of ss. 80J and 80HH of the Act, finding no trace in regard thereto but consider whether the assessee can have any benefit of the observations of the apex Court. When this petition was taken up for hearing on 23rd July, 1996, with anxiety we asked the counsel with regard to the material in the context. When the petition was taken up today the learned counsel on going through the material in his possession submitted that the

material would only relate to the ground dealt with by the three authorities and would not be one to satisfy us to feel that there is a prima facie case with regard to the statutory conditions of ss. 80J and 80HH specified hereinbefore. The learned counsel submitted that it was only on one aspect the claim is rejected. The learned counsel for the purpose of submission meant thereby that it should be presumed that the authority was satisfied with regard to all other aspects which is the course of travel of the present proceedings and generally the tax proceedings.

17. It must be stated that when we are required to consider the submission of denial of opportunity and a dent to the principles of natural justice, remand also requires its a priori satisfaction that such order of remand would assure justice not in vacuum but in an effective manner. Even if we peruse the questions there is no doubt that the assessee has to satisfy the statutory requirements of ss. 80J and 80HH. In addition thereto we have also to give expected way to the observations of the Tribunal that the proceedings before it were adjourned several times making it helpless to observe that it could not be inclined to grant further adjournments. The Tribunal also has observed that only an argument is developed in the course of passing observations of the apex Court without any material before us.

18. We also record our own assessment of the situation. Assessee in the travel of the proceedings has proceeded on erroneous presumption. From the situation that the ITO rejected the claim and in support thereof recorded a reason, a situation leading to the presumption that the officer has accepted that other conditions or conditions of the statutory requirement are satisfied. There is no factual matrix required for consideration of the claim and the learned counsel, in answer to a pointed query as to whether there is any material laid before the ITO prior to the order passed by him showing satisfaction of the statutory requirements, expressed inability in the direction. This means that this was not pleaded. It also means that no material is placed before the ITO with regard to individual items so that there can be an effective consideration in the light of the observations of the apex Court referred to above. All these makes the position more than clear that the observations of the apex Court are sought to be taken as the last straw on the camels back, nay, if yet a second inning of the proceedings on the basis of thoughts that did not occur to any one hitherto but for the judgment of the apex Court. In our judgment this is a violation to the eternal principle of finality of orders in the context. For all the above reasons we find that there are no referable questions and the petition stands dismissed as a consequence.