

(1993) 10 BOM CK 0038

In the Bombay High Court

Case No : Income-tax Reference No. 244 of 1981

Associated Cement Co. Ltd.

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 19-10-1993

Acts Referred:

Income Tax Act, 1961 — Section 33, 33(6), 35B, 35B(1)

Citation : (1994) 116 CTR 635 : (1994) 210 ITR 69

Hon'ble Judges : D.R. Dhanuka, J;B.P. Saraf, J

Bench : Division Bench

Advocate : Soli Dastur, P.F. Kaka, A.H. Ponda and K.D. Mehta, instructed by Payne and Co, for the Appellant; T.V. Khatri and J.P. Deodhar, for the Respondent

Judgement

Dr. B.P. Saraf, J.—By this reference u/s 256(1) of the Income Tax Act, 1961, the Income Tax Appellate Tribunal, at the instance of the assessee, has referred the following questions of law to this court for its opinion :

"1. Whether, on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal has rightly disallowed the claim of the assessee for weighted deduction u/s 35B of the Income Tax Act, 1961, in respect of the prospecting expenses in Bhutan amounting to Rs. 2,11,000 ?

2. Whether, on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal has rightly disallowed the claim of the assessee for development rebate amounting to Rs. 3,15,000 u/s 33(6) of the Income Tax Act, 1961 ?"

2. The assessee-company carries on the business of manufacture and sale of cement. It also carries on business as miners, metallurgists, builders, contractors, engineers, merchants, importers and exporters and deals in property of all kinds. It also carries on investigations to discover places where cement can be profitably made and is engaged in prospecting and research work to obtain prospecting licences. During the assessment year 1971-72, the

assessee entered into a contract with the Government of Bhutan for prospecting limestone in Bhutan. As per letter dated September 9, 1968, addressed to the Trade Commissioner, Government of Bhutan, the assessee agreed to send its geologist to Bhutan to explore the possibility of existence of sufficient quantity of limestone so as to determine the viability of its commercial exploitation. For the above services, which were expected to take about eleven months, the assessee was to be paid a sum of Rs. 4,50,000 in installments and in the manner specified in the said letter. The terms contained in the above letter of the assessee were accepted by the Government of Bhutan, vide its Trade Commissioner's letter dated October 11, 1968. The assessee undertook the said work and incurred an expenditure of Rs. 2,11,000 in connection therewith. The assessee claimed export development allowance ("weighted deduction") in respect of the said amount u/s 35B of the Income Tax Act, 1961 ("the Act"). The claim of the assessee for weighted deduction was not allowed by the Income Tax Officer. On appeal, the order of the Income Tax Officer was confirmed by the Appellate Assistant Commissioner and the Income Tax Appellate Tribunal. The assessee has, therefore, come to this court by way of reference. Question No. 1 pertains to the above controversy.

3. The controversy in the second question relates to disallowance of development rebate in respect of expenditure incurred by the assessee on water works. The relevant facts which have given rise to this controversy are as follows : During the previous year relevant to the assessment year under reference, the assessee had spent a sum of Rs. 28,53,200 in making additions to the water works at its factory and at its residential colony. The assessee claimed development rebate u/s 33 of the Act in respect of the said amount. The Income Tax Officer found that out of the total cost of water works amounting to Rs. 28,53,200, a sum of Rs. 9,00,000 was the cost of water works at the residential colonies. The Income Tax Officer, therefore, did not allow development rebate in respect of the said amount. Development rebate was, however, allowed in respect of the balance amount of expenditure which pertained to the water works at the factory. The assessee appealed to the Appellate Assistant Commissioner. The Appellate Assistant Commissioner reversed the order of the Income Tax Officer and held in favour of the assessee. According to the Appellate Assistant Commissioner, development rebate was allowable as the water works in question were used for the purpose of business of the assessee. The Revenue appealed to the Tribunal against the order of the Appellate Assistant Commissioner. Before the Tribunal, it was contended on behalf of the assessee that construction of residential houses by the assessee for its staff near its factory and the installation of water works for supply of water to these residential colonies was absolutely essential in the interest of its business and such water works must be held to have been used by the assessee for its business purposes entitling it to development rebate. The Revenue relied on the provisions of Section 33(6) of the Act and contended that the assessee was not entitled to claim development rebate in respect of the new water works installed in its residential colonies. On consideration of the rival

contentions, the Tribunal came to the conclusion that the assessee was not entitled to development rebate on this amount in view of the specific prohibition contained in Section 33(6) of the Act. The Tribunal, therefore, restored the order of the Income Tax Officer in this regard. The assessee has come in reference against this decision also which is the subject-matter of question No. 2.

4. We have heard learned counsel for the assessee, Mr. Soli Dastur, at length. So far as the first question is concerned, the submission of learned counsel is that the expenditure incurred by the assessee falls within Sub- Clauses (ii), (iii) and (viii) of Clause (b) of Section 35B(1) of the Act. We have considered the above submission. Section 35B of the Act provides for allowance of weighted deduction on expenditure incurred wholly and exclusively on any of the activities specified in the various sub-clauses of Clause (b) of Section 35B(1) of the Act. Sub-clauses (ii), (iii) and (viii) of Clause (b) of Section 35B(1) of the Act are in the following terms :

"(ii) obtaining information regarding markets outside India for such goods, services or facilities ;

(iii) distribution, supply or provision outside India of such goods, services or facilities, not being expenditure incurred in India in connection therewith or expenditure (wherever incurred) on the carriage of such goods to their destination outside India or on the insurance of such goods while in transit ;

(viii) performance of services outside India in connection with, or incidental to, the execution of any contract for the supply outside India of such goods, services or facilities ;"

5. On perusal of the above sub-clauses, we are of the opinion that the expenditure incurred by the assessee in the instant case falls under Sub- Clauses (iii) and (viii) of Clause (b) of Section 35B(1). The uncontroverted factual position in this case is that the assessee supplied certain services to the Government of Bhutan in the course of its business in pursuance of an agreement between the assessee and the Government of Bhutan which stipulates supply of such services by the assessee-company and payment of remuneration thereof to the assessee by the Government of Bhutan. The details of the services are specified in the letters exchanged between the assessee and the Government of Bhutan. The assessee was to be paid a sum of Rs. 4,50,000 for the above services. The expenditure in question was incurred by the assessee wholly and exclusively for the supply of such services to the Government of Bhutan. The services were supplied in Bhutan. It is, therefore, an expenditure incurred wholly and exclusively for the supply of services outside India within the meaning of Sub-clause (iii). In any event, it will fall in Sub-clause (viii) as an expenditure incurred in connection with, or incidental to, the contract for supply outside India of the services in question. In that view of the matter, the assessee is entitled to weighted deduction u/s 35B of the Act in respect of such expenditure. We have also perused Sub-clause (ii) of Section 35B(1)(b) of the

Act. In our opinion, this clause has no application to the expenditure under consideration.

6. In view of the foregoing discussion, we answer question No. 1 in the negative, i.e., in favour of the assessee and against the Revenue.

7. We now turn to question No. 2 which pertains to allowability of development rebate on the cost of water works amounting to Rs. 9,00,000 incurred by the assessee for provision of supply of water to the residential colonies. On a careful consideration of the facts and circumstances of the case and the provisions of Section 33(6) of the Act, we find ourselves in agreement with the Tribunal that the assessee is not entitled to development rebate in respect of the same. The total cost of additions to the water works during the year was Rs. 28,53,200. The Income Tax Officer bifurcated this cost into two parts, viz., cost of water works at the factory and cost of water works at the residential colonies. The Income Tax Officer estimated the cost of the water works at the residential colonies at Rs. 9,00,000. He allowed the claim for development rebate in respect of the cost of the water works at the factory amounting to Rs. 19,53,200 and disallowed the claim in respect of the cost of water works at the residential colonies. We do not find any infirmity in this action of the Income Tax Officer which was also approved by the Tribunal. Learned counsel for the assessee submits that the water works in this case were not installed in the residential accommodation but they were installed at the river bed though water was supplied therefrom to the residential colonies also. As such, it cannot be said that the "plant" was installed "in the residential accommodation" so as to attract Section 33(6) of the Act. We have considered the above submission. Section 33 of the Act deals with allowance of development rebate. Development rebate is allowable under this section, inter alia, in respect of new machinery or plant owned by the assessee and wholly used for the trade carried on by him. The assessee may be correct in saying that the user of the water works in this case was by the staff of the assessee in the residential accommodation provided to them by the assessee for the purpose of business. But that is not relevant for the present controversy. Sub-section (6) of Section 33 puts a bar on allowance of development rebate in the cases falling thereunder. It reads as under :

"(6) Notwithstanding anything contained in the foregoing provisions of this section, no deduction by way of development rebate shall be allowed in respect of any machinery or plant installed after the 31st day of March, 1965, in any office premises or any residential accommodation, including any accommodation in the nature of a guest house :"

8. This is a non obstante clause. It is applicable notwithstanding anything contained in the other provisions of Section 33. It was inserted by the Finance Act, 1965, with effect from April 1, 1965, to take out of the purview of Section 33 "plant and machinery" specified therein. This subsection thus carved out of Section 33 something which was there earlier. It clearly provides that no deduction by way of development rebate would be allowable in respect of any

machinery or plant installed in any office premises or any residential accommodation, including any accommodation in the nature of a guest house. The contention of the assessee that the water works were not installed in the residential accommodation but at the river bed does not appear to be relevant because in this case out of the total cost of Rs. 28,53,200, the assessee has already been allowed development rebate in respect of a sum of Rs. 19,53,200. This clearly goes to show that the claim of the assessee for development rebate in respect of the water works as such has not been disallowed by the Income Tax Officer. What has been disallowed is the claim of development rebate in respect of the cost of the water works installed at the residential colonies, which was estimated at Rs. 9,00,000. In that view of the matter, there is no force in the submission of the counsel for the assessee that the water works had been installed at the river bed and not in the residential accommodation. There is a clear factual finding that the cost of water works installed at the residential colonies was Rs. 9,00,000 and the claim of the assessee for development rebate has been disallowed only in respect of this amount. That being so, Section 33(6) is clearly attracted and the Tribunal was justified in not allowing the development rebate in respect of the same.

9. Learned counsel for the assessee also drew our attention to the Memorandum explaining the provisions in the Finance Bill, 1965 (printed at page 131 of ITR Vol. 55 (St.)), wherein at page 149, it has been stated that machinery or plant installed after March 31, 1965, in the office or residential accommodation including residential accommodation of the nature of a guest house, such as air-conditioners, fans, refrigerators, etc., will not qualify for development rebate. Our attention was also drawn to Circular No. 3-P, dated October 11, 1965, of the Central Board of Direct Taxes explaining the provisions of the Finance Act, 1965, wherein it has been stated that the effect of the newly added Sub-section (6) to Section 33 of the Act is that development rebate will not be admissible in respect of machinery such as air-conditioners, frigidaire, room heaters, electric fans, etc., in any office premises or any residential accommodation including a guest house. The submission of learned counsel for the assessee is that the items specified in the Memorandum explaining the provisions of the Finance Bill, 1965, and the Board's aforesaid Circular dated October 11, 1965, clearly go to show that Section 33(6) of the Act is applicable only to "machinery and plant" such as air-conditioners, frigidaire, room heaters, electric fans or the like and not to all "plant and machinery". We have carefully considered the above submission. We find it difficult to accept the same because Sub-section (6) of Section 33 has used the same expression "any machinery or plant" which has been used in the other subsections of the said section. It is a well-settled rule of interpretation that any word or expression used in different sub-sections of the same section cannot be interpreted differently and assigned different meanings in different sub-sections in the absence of any provision in the statute to the contrary. The various items mentioned in the aforesaid Memorandum explaining the provisions in the Finance Bill, 1965, and the Board's Circular dated October 11, 1965, are

only illustrative and not exhaustive which is evident from the use of the word "etc.". In any event, the Memorandum explaining the provisions of the Finance Bill or the circular of the Board cannot be used to curtail or modify the clear meaning of an expression used in the statute. We are, therefore, of the opinion that the expression "machinery or plant" cannot be restricted only to some of the species thereof mentioned in the Memorandum explaining the provisions of the Finance Bill and the Board's Circular dated October 11, 1965.

10. Learned counsel for the assessee also referred to a decision of this court in CIT v. Thana Electricity Supply Ltd. [1994] 206 ITR 27, wherein this court was required to examine whether the electric meter supplied by an electricity company in the residential accommodation will fall within Section 33(6) of the Act. We have perused the above judgment. We find that in the above case, this court, while interpreting Section 33(6) of the Act, was of the opinion that "plant and machinery installed in the residential accommodation" could mean only those plants and machinery which are intended for use therein. This judgment, in our opinion, does not help the assessee in the present case. It cannot be contended that the water supply was not intended for use in the residences. If any machinery or plant was installed in the residential accommodation for supplying water to the residents, it will fall within Section 33(6) of the Act. It may also be pertinent to mention that whatever might be the components of the water works, the admitted position is that it is "plant and machinery" and it is on that basis alone that development rebate is claimed u/s 33 of the Act. In that view of the matter, it is not necessary to go into the components of the installations. On the other hand, we can proceed on the basis that these are plant and machinery and it is on that basis alone that the assessee is claiming development rebate. If that is so, then they are plant and machinery for the purposes of Section 33(6) also.

11. Learned counsel for the assessee further submitted that there is no basis for the Income Tax Officer to arrive at the figure of Rs. 9,00,000 as the cost of water works at the residences in the colonies. We do not think that it is open to us to go into this controversy at this stage because it is a question of fact which stands concluded by the finding of the authorities below.

12. In view of the foregoing discussion, we answer question No. 2 in the affirmative, i.e., in favour of the Revenue and against the assessee. Under the facts and circumstances of the case, we make no order as to costs.