(1993) 11 RAJ CK 0026

In the Rajasthan High Court

Case No : Income Tax Reference No. 127 of 1981

Associated Stone Industries Ltd. — APPELLANT

Vs

Commissioner of Income Tax — RESPONDENT

Date of Decision : 19-11-1993

Acts Referred:
Income Tax Act, 1961 — Section 32, 35B, 35B(1), 43, 43(1)

Citation : (1994) 210 ITR 821

Hon'ble Judges : K.C. Agrawal, C.J;V.K. Singhal, J

Bench : Division Bench

Advocate : G.S. Bapna, for the Respondent

Judgement

V.K. Singhal, J.—The Income Tax Appellate Tribunal has referred the following questions of law arising out of its order dated September 30, 1980, in respect of the assessment year 1976-77 :

"1. Whether, on the facts and in the circumstances of the case and in law, the Tribunal was right in holding that the amount of Rs. 2,08,008 being conditional subsidy received from the Rajasthan Government under the subsidised housing scheme for industrial workers did not form part of the ''actual cost'' of the labour colony u/s 43(1) and, consequently, the assessee-company was not entitled to get deduction for depreciation of Rs. 4,820 on the said amount u/s 32 of the Income Tax Act, 1961 ?

2. Whether, on the facts and in the circumstances of the case and in law the Tribunal was right in holding that weighted deduction u/s 35B of the Income Tax Act was not allowable in respect of expenditure of Rs. 3,25,506 on freight, packing charges, etc., and in respect of Rs. 4,287 being 25 per cent, of salary of staff looking after export business ?"

2. The brief facts of the case are that the assessee, a limited company, claimed initial depreciation and normal depreciation on the labour colony. The claim for depreciation was on the actual cost of the labour colony which included the

amount of Rs. 2,08,008 which was a conditional subsidy received from the Rajasthan Government under the subsidised housing scheme for industrial workers. The Income Tax Officer held that the amount of Rs. 2,08,008 could not form part of the actual cost to the assessee of the said colony and, therefore, depreciation was not admissible thereon.

3. In respect of weighted deduction u/s 35B of the Income Tax Act, 1961, the assessee claimed the total expenditure of Rs. 3,83,027.

4. The claim of Rs. 40,373 in respect of foreign travel and postage was allowed in full and staff salary to the extent of 75 per cent., i.e., Rs. 12,861, was allowed and the balance of the staff salary, Rs. 4,287 and Rs. 3,25,506, in respect of freight and packing were disallowed.

5. The matter with regard to question No. 1 was considered by this court in D. B. Income Tax Reference No. 99 of 1979 (Associated Stone Industries (Kota) Ltd. v. CIT) decided on January 27, 1987, and it was held as under :

"Question No. 1 relates to the deduction of the amount of Rs. 2,08,008 which was received by the assessee as subsidy from the Rajasthan Government under the subsidised housing scheme for industrial workers, for the purpose of determining the actual cost of the labour colony u/s 43(1) of the Income Tax Act, 1961. The Tribunal has found that the said amount has to be deducted for the purpose of determining the actual cost u/s 43(1) of the Income Tax Act, 1961, for the reason that the amount of the subsidy was not required to be repaid by the assessee to the State Government. The Tribunal has not accepted the submission of the assessee that in case the assessee-company made a default in repaying any of the instalments of the loan of Rs. 4,17,000, the said subsidy was repayable with interest from the date on which the subsidy was given by the State Government. The Tribunal has held that it was common ground that the assessee-company did not commit any default in repayment of the instalments of the loan to the State Government and the labour colony was built in accordance with the agreement entered into between the assessee and the State Government of Rajasthan and in these circumstances the amount of subsidy given by the State Government to the assessee for constructing the labour colony would not be converted into a loan. In view of the aforesaid findings recorded by the Tribunal that the amount of subsidy given by the State Government to the assessee for constructing the labour colony would not be converted into a loan, the said amount of subsidy was deductible u/s 43(1) of the Income Tax Act, 1961, for the purpose of assessing the actual cost of the labour colony and the Tribunal, was, therefore, right in taking the said view. In that view of the matter, question No. 1 must be answered against the assessee and in favour of the Revenue."

6. On the basis of the above decision of this court, we are of the view that the Income Tax Appellate Tribunal was right in holding that the amount of Rs. 2,08,008 being conditional subsidy received from the Rajasthan Government

under the subsidised housing scheme for industrial workers did not form part of the "actual cost" of the labour colony u/s 43(1) and, consequently, the assessee-company was not entitled to get deduction for depreciation of Rs. 4,800 for the year 1976-77, Rs. 4,685 for the year 1977-78 and Rs. 4,568 for the year 1978-79 on the said amount u/s 32 of the Income Tax Act.

7. Regarding question No. 2, it was found in the assessment year 1976-77 that the freight and packing charges of Rs. 3,25,506 and staff salary to the extent of 25 per cent. was disallowable.

8. The provisions of Section 35B(1)(b)(iii) provide that the expenditure referred to in Clause (a) is that incurred wholly and exclusively on (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.

9. The above clause was amended by the Finance Act, 1970, with retrospective effect from April 1, 1968, for (iii) distribution, supply or provision outside India of such goods, services or facilities outside India or on the insurance of such goods while in transit, (when such expenditure is incurred before the 1st day of April, 1978),

10. From the above clause it would be evident that the expenditure incurred on the carriage of goods outside India to their destination or on the insurance of such goods while in transit, has specifically been excluded and the relief contemplated was restricted to the expenditure incurred wholly and exclusively on the distribution, supply or provision outside India of goods, services or facilities.

11. Explanation 2 was also inserted by the Finance Act, 1973, which was also from April 1, 1968, and according to which it was provided as under:

"Explanation 2.--For the purposes of Sub-clause (iii) and Sub-clause (viii) of Clause (b), expenditure incurred by an assessee engaged in the business of-

(i) operation of any ship or other vessel, aircraft or vehicle ; or

(ii) carriage of, or making arrangements for carriage of, passengers, livestock, mail or goods,

on or in relation to such operation or carriage or arrangements for carriage (including in each case expenditure incurred on the provision of any benefit, amenity or facility to the crew, passengers or livestock) shall not be regarded as expenditure incurred by the assessee on the supply outside India of services or facilities."

12. The expenditure in respect of freight and packing charges falls within exclusion clause, namely, "on the carriage of such goods to their destination outside India" and, therefore, no weighted deduction in respect of packing charges was allowable.

13. In J.M.A. Industries Ltd. Vs. Commissioner of Income Tax, the Delhi High Court has held that a claim for weighted deduction u/s 35B of the Income Tax Act, 1961, is not admissible for expenses incurred on freight, packing charges, etc., and paid in India. In Jayshree Tea and Industries Limited Vs. Commissioner of Income Tax, it was held that the assessee is not entitled to weighted deduction u/s 35B on the expenses incurred on freight and insurance.

14. The Bombay High Court in M.H. Daryani Vs. Commissioner of Income Tax, has held that even if the expenditure falls within Section 35B(1)(b)(iii), the expenditure incurred in India in connection with the activities mentioned in Sub-clause (iii), or (2) expenditure wherever incurred (i) on the carriage of such goods to their destination outside India, or (ii) on the insurance of such goods while in transit have been excluded.

15. In I.C. Gandhi Silk Mills Pvt. Ltd. Vs. Commissioner of Income Tax, it has been held that the packing and forwarding expenses, insurance, audit fees, advertisement and part of the expenses on postage, telegram and telephone, travelling, printing and stationery, salaries, wages and bonus and miscellaneous charges are not entitled to weighted deduction u/s 35B.

16. The Madhya Pradesh High Court in CIT v. K. N. Oil Industries [1982] 134 ITR 651 has held that the expenditure on the carriage of goods to their destination outside India or on insurance on goods while in transit is not entitled to weighted deduction u/s 35B.

17. The Madras High Court has upheld the order of the Income Tax Appellate Tribunal in the case of K. Vensimal and Sons Vs. Commissioner of Income Tax, wherein 50 per cent. of the expenditure in respect of salary and rent was allowed by the Tribunal and it was held that the expenditure in respect of salary and rent is relatable to sales activities and restricted the weighted deduction to that extent and no question of law could be said to arise out of the said decision. It was further held that deduction in respect of freight, cooly and packing charges being expenditure incurred in India in connection with the carriage of goods to destinations outside India or on the insurance of such goods while in transit is not allowable.

18. The Delhi High Court in Commissioner of Income Tax, Delhi (Central-I) Vs. Raunaq International Ltd., has held that the percentage of expenditure on which weighted deduction is to be given is a question of fact.

19. The expenditure incurred by the assessee for payment of salary to its staff was considered to the extent of 75 per cent. as representing the work for handling the export business of the assessee. The assessee is carrying on the business of effecting sales within India as well as export out of India and, therefore, a finding has been given that out of the claim of salary, only 75 per cent. was to be allowed as pertaining to the export find 25 per cent. was disallowed. This is a finding of fact which does not warrant any interference.

20. Accordingly, we hold that the Income Tax Appellate Tribunal was justified in coming to the conclusion that weighted deduction u/s 35B of the Income Tax Act was not allowable in respect of the expenditure on freight and packing charges and the Tribunal was justified in disallowing 25 per cent. of the salary of the staff which was looking after the export business.

21. The reference is answered in favour of the Revenue and against the assessee. No orders as to costs.