
(1996) 07 KL CK 0020
In the High Court Of Kerala
Case No : O.P. No. 397 of 1996-S

Bhagheeratha Engineering Ltd.

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 26-07-1996

Acts Referred:

Income Tax Act, 1961 — Section 254(2), 256(2), 32A(2)

Citation : (1997) 2 ILR (Ker) 113 : (1997) 227 ITR 504

Hon'ble Judges : V.V. Kamat, J; P.A. Mohammed, J

Bench : Division Bench

Advocate : George Mathan, for the Appellant; P.K.R. Menon and N.R.K. Nair, for the Respondent

Judgement

P.A. Mohammed, J.—This is an application by the assessee u/s 256(2) of the Income Tax Act, 1961, seeking for a direction to the Income Tax Appellate Tribunal, Cochin Bench, to refer the following questions :

" 1. Whether, on the facts and in the circumstances of the case, the Tribunal was right in allowing the miscellaneous application of the Revenue on the footing that the grant of investment allowance to the assessee for the assessment year 1985-86 suffered from an error apparent from the record ?

2. Whether the decision of the Tribunal on the issue of grant of investment allowance to the assessee governed by the judgment of the High Court in COMMISSIONER OF Income Tax Vs. BHAGEERATHA ENGINEERING LTD., , the SLP against which was dismissed by a speaking order by the Supreme Court or by the later judgment of the Supreme Court in Commissioner of Income Tax, Orissa and Others Vs. N.C. Budharaja and Company and Others, or by the observation of the Supreme Court touching the High Court's judgment in Bhageeratha Engineering Ltd's case and the dismissal of SLP in a still later judgment of the Supreme Court in Builders Associations of India Vs. Union of India and others, , would be said to suffer from a mistake apparent from the record ? "

2. The facts which are necessary for the disposal of this application are narrated below : The petitioner is a company known as "Bhagheeratha Engineering Ltd." engaged in civil construction of dams, structural engineering and other related activities. For the assessment year 1985-86, the assessee-company claimed investment allowance of Rs. 16,04,864 in respect of plant and machinery used for the purpose of its business newly installed. The case of the assessee is that the investment allowance was allowed by the Commissioner of Income Tax in the appeals relating to the earlier years. The Assessing Officer, however, denied the claim on the ground that the Revenue has filed further appeal before the Tribunal against the order of the Commissioner. On appeal, the Commissioner of Income Tax (Appeals) allowed the claim of the assessee following the order of the Tribunal for the assessment years 1980-81 and 1981-82 in ITA Nos. 220 and 221/Coch. of 85 dated January 30, 1987. As against the said order, the Revenue filed an appeal before the Income Tax Appellate Tribunal. In the-, said appeal, the order of the Commissioner of Income Tax (Appeals) was upheld by the Tribunal as per the order dated October 6, 1993. Later, the Revenue filed Miscellaneous Application No. 4/Coch. of 1994 for rectification of the order passed by the Tribunal. In that application, the Tribunal found that in view of the judgment of the Supreme Court in Commissioner of Income Tax, Orissa and Others Vs. N.C. Budharaja and Company and Others, , the assessee is not entitled to deduction of investment allowance for the assessment year 1985-86. Therefore, by the order dated August 8, 1994, the Tribunal recalled its order in ITA No. 511/Coch. of 1989 for the assessment year 1985-86 in so far as it relates to the issue of investment allowance. The result is the investment allowance granted to the assessee was withdrawn. The assessee thereafter filed an application u/s 256(1) of the Income Tax Act. The said application was disallowed by the Tribunal by the order dated August 17, 1995. The present application for compelling reference is in pursuance of the said order.

3. Heard learned counsel for the assessee and standing counsel for the Revenue.

4. We will now advert as to how the issue regarding investment allowance has been dealt with by the authorities below. Paragraph 10 of the assessment order speaks of this issue as extracted hereunder ;

" The assessee has claimed a sum of Rs. 16,04,864 as investment allowance on earth moving equipment and construction machinery. The assessee's circuit was that in the earlier years where the investment allowance on similar circumstances was not allowed by the Department, the same was allowed in appeal by the learned Commissioner of Income Tax (Appeals). Therefore, the assessee is entitled to investment allowance on the strength of the learned Commissioner of Income Tax (Appeals) order. But the Department has not accepted the decision of the learned Commissioner of Income Tax (Appeals) and further appeals to the Tribunal has been filed. I would, therefore, not entertain the claim of the assessee."

5. Apart from the above, we do not see any factual materials regarding the claim

for investment allowance. We are, therefore, prevented from examining whether the requirements provided under the relevant provision regarding the claim have been satisfied in this case.

6. The Commissioner of Income Tax (Appeals) says about the investment allowance thus :

" The next ground of appeal is regarding the claim of investment allowance of Rs. 16,04,864. The appellant's representative stated that this issue has been decided in favour of the appellant by the Income Tax Appellate Tribunal, Cochin, in their own assessment for the assessment years 1980-81 and 1981-82 in Appeal No. 220 and 221 (Coch.) of 1985 dated January 30, 1987. Since, the issue is covered by the Income Tax Appellate Tribunal's decision mentioned above, the Appellate Assistant Commissioner is directed to allow the claim of investment allowance."

7. Here, too we do not see any discussion on factual materials. However, in the appeal filed by the Revenue against the above order, the Tribunal placed reliance on the decision of the Division Bench of this court in COMMISSIONER OF Income Tax Vs. BHAGEERATHA ENGINEERING LTD., which was decided in the case of the same assessee for the assessment years 1980-81 and 1981-82 and accordingly upheld the finding of the Commissioner of Income Tax (Appeals).

8. The Division Bench in the above decision said that the Tribunal's finding that the assessee was an industrial undertaking had not been challenged. It further said to the following effect (headnote) : "Even on the merits, the assessee carried on the business of construction in a systematic manner. While engaged in the business of construction, it manufactured and processed various materials. It used the plant or machinery in such ancillary activities to carry on the business of construction more efficiently and economically. Hence, the assessee used the new machinery or plant in an industrial undertaking for the purpose of construction, manufacture or production of an article or thing and such article or thing was not one specified in the list in the Eleventh Schedule and so the assessee was entitled to the relief u/s 32A." From the above it is sufficiently clear that the assessee had pleaded in the above case for " the relief u/s 32A(2)(b) (iii) of the Act. Therefore, the assessee cannot have any plea other than the one argued in the above case.

9. The decision of the Division Bench referred to above was rendered on May 3, 1991. Later, the Revenue filed a petition for rectification in view of the decision of the Supreme Court in Commissioner of Income Tax, Orissa and Others Vs. N.C. Budharaja and Company and Others, . The Tribunal issued notice to the assessee and after hearing both assessee and the Revenue, the Tribunal came to the conclusion that the assessee is not entitled to deduction of investment allowance for the assessment year 1985-86. Consequently, the order passed in ITA No. 511/ Coch of 1989 was recalled in so far as it relates to the grant of investment allowance. We do not see any error in the order passed by the Tribunal in

rectifying the earlier order and withdrawing the investment allowance in view of Commissioner of Income Tax, Orissa and Others Vs. N.C. Budharaja and Company and Others, .

10. Counsel for the assessee argued that the assessee's case has been squarely covered by the decision of the Division Bench of this court in COMMISSIONER OF Income Tax Vs. BHAGEERATHA ENGINEERING LTD., As pointed out above, the decision in COMMISSIONER OF Income Tax Vs. BHAGEERATHA ENGINEERING LTD., , relates to the assessment years 1980-81 and 1981-82. As far as the assessments under the Income Tax Act or any other fiscal enactments are concerned, every assessment year is a single unit for the purpose of assessment. The findings recorded in respect of an assessment year by the authorities under the Act cannot be said to be final and conclusive in so far as the subsequent assessment years are concerned. Such findings are final and conclusive only in respect of the particular assessment year which directly came up for consideration before the authorities concerned. In this case, we are directly concerned with the facts available in support of the claim for investment allowance in respect of the year 1985-86. For the purpose of the present case, it is most unsafe to rely on the materials available in a case which arose four years ago.

11. It is further argued by counsel for the assessee that the claim for investment allowance is mainly in view of the provisions contained in Sub-section (2) of Section 32A. Hence, it may be claimed either under Clause (b)(ii) or (b) (iii) of Section 32A(2). The claim u/s 32A(b)(ii) can be allowed only on satisfying two requirements, namely ;

(1) The assessee must be a small scale industrial undertaking.

(2) The machinery or plant must be for the purposes of business of manufacture or for production of any article or thing.

12. In order to claim the said allowance under the above provision it is essential that the assessee must establish the above requirements. In the present case, the assessee except relying on the decision relating to the previous year did not disclose any factual material required for taking a decision. In this context it can be seen that the claim u/s 32A(2)(b)(ii) and (iii) are different and distinct. That being so, the requirements for each claim must be pleaded and proved. On a perusal of the assessment order as a whole, we do not find any factual basis for claiming the investment allowance either under Clause (b)(ii) or (b)(iii) in respect of the year 1985-86. We have also anxiously gone through the orders of the Commissioner of Income Tax (Appeals), the order of the Tribunal and also the present petition filed u/s 256(2). However, we could not see any factual materials for claiming investment allowance u/s 32A(2) except the decision of the authorities in respect of the previous years and the Division Bench decision of this court reported in COMMISSIONER OF Income Tax Vs. BHAGEERATHA ENGINEERING LTD., .

13. It was argued by counsel for the assessee that the decision of the Supreme Court in Commissioner of Income Tax, Orissa and Others Vs. N.C. Budharaja and Company and Others, , cannot be applied in the case of the assessee. On the other hand, counsel for the Revenue pointed out that the entire question on the subject has been squarely covered by the decision of the Supreme Court in Commissioner of Income Tax, Orissa and Others Vs. N.C. Budharaja and Company and Others, . In fact, the Tribunal has allowed the application for rectification on the basis of this decision. The second group of appeals considered by the Supreme Court in that case related to the claim of investment allowance. The Supreme Court In the above decision at page 423 observed thus :

" The word "production" or "produce" when used in juxtaposition with the word "manufacture" takes in bringing into existence new goods by a process which may or may not amount to manufacture. It also takes in all the by-products, intermediate products and residual products which emerge in the course of manufacture of goods. The next word to be considered is "articles", occurring in the said clause. What does it mean ? The word is not defined in the Act or the rules. It must, therefore, be understood in its normal connotation -- the sense in which it is understood in the commercial world. It is equally well to keep in mind the context since a word takes its colour from the context."

14. The Supreme Court finally said in page 434 of the report thus :

" We are, therefore, of the opinion that Sub-clause (iii) of Clause (b) of Sub-section (2) of Section 32A does not comprehend within its ambit construction of a dam, a bridge, a building, a road, a canal and other similar constructions."

15. The Division Bench of this court in COMMISSIONER OF Income Tax Vs. BHAGEERATHA ENGINEERING LTD., , referred to the decision of the Orissa High Court in Commissioner of Income Tax Vs. N.C. Budharaja and Company, , and observed :

" The court came to the conclusion that the construction of a dam itself was a manufacturing process."

16. The above decision of the Orissa High Court has been reversed by the Supreme Court in Commissioner of Income Tax, Orissa and Others Vs. N.C. Budharaja and Company and Others, .

17. It is pointed out that the decision of the Division Bench of this court in COMMISSIONER OF Income Tax Vs. BHAGEERATHA ENGINEERING LTD., , has been affirmed by the Supreme Court in Commissioner of Income Tax v. Bhageeratha Engineering Ltd, (1993) 199 ITR 12 (SC) . The argument is that the Supreme Court in that case had taken a contrary view to the one taken in Commissioner of Income Tax, Orissa and Others Vs. N.C. Budharaja and Company and Others, , with respect to Section 32A(2)(b)(iii). Such an argument has been repelled by the Supreme Court in Builders Associations of India Vs. Union of India and others, . In this connection it observed thus (page 888) :

" This court dismissed the Revenue's appeal in view of the finding recorded by the Tribunal (which finding was accepted by the High Court) that "the assessee is engaged mainly in the manufacture or processing of goods and is an "industrial undertaking". The Tribunal had also found that the assessee has used the machinery in the business of construction, and the said finding was not challenged before the High Court. In the above circumstances, the High Court opined that it was not open to the Revenue to contend before it that the assessee-company was not an "industrial company". The extract from the High Court judgment quoted in this court's order clearly shows that the contention of the Revenue was that the assessee was not an "industrial company" and that the interpretation of the words "construction, manufacture or production of any article or thing not being an article or thing specified in the list in the Eleventh Schedule" was not really in issue therein. It, therefore, cannot be said that this court has taken a different view on the interpretation of the said words in Commissioner of Income Tax v. Bhageeratha Engineering Ltd, (1993) 199 ITR 12 (SC) ."

18. What we could see from the aforesaid observation is that the Supreme Court has placed reliance on the factual findings entered in that case relating to the assessment years 198-81 and 1981-82 by the Tribunal and the High Court.

19. We have hereinbefore said that in respect of the year 1985-86, no factual material is available anywhere in the proceedings to sustain the claim for investment allowance either u/s 32A(2)(b)(ii) or 32A(2)(b)(iii). Then the question arises as to how the Tribunal has sustained the order of the Commissioner of Income Tax (Appeals) allowing the said claim of the assessee. It may be due to misconception of facts or mistaken assumption of facts. The claim was allowed by the Commissioner of Income Tax only on the basis of the order relating to the year 1980-81 without examining the factual basis. In such situations, the power of the Tribunal under Sub-section (2) of Section 254 can be exercised to rectify its own mistake in the order passed under Sub-section (1). Further, the law now applicable with regard to the claim for investment allowance u/s 32A(2)(b)(iii) is the one declared by the Supreme Court in Commissioner of Income Tax, Orissa and Others Vs. N.C. Budharaja and Company and Others, . This law now holds the field in view of Article 141 of the Constitution and is binding on all courts within the territory of India. When the matter is thus outlined, we cannot find fault with the Tribunal in allowing the application for rectification filed by the Revenue. The Tribunal has thus acted within its powers in passing the impugned order.

20. We do not see any referable questions involved in this application. Accordingly, we dismiss this original petition.