(1998) 11 BOM CK 0100

In the Bombay High Court

Case No : IT Rel. No. 82 of 1988

COMESSIONER OF INCOME TAX — APPELLANT

Vs

SHAH CONSTRUCTION CO. LTD. — RESPONDENT

Date of Decision : 25-11-1998

Acts Referred:
Income Tax Act, 1961 — Section 256(1)

Citation : (1999) 153 CTR 160

Hon'ble Judges : Pratibha Upasani, J;Dr. Pratibha Upasani, J;Dr. B.P. Saraf, J;B.P. Saraf, J

Bench : Full Bench

Advocate : R. V Desai with B.M. Chatterjee and S.J Mehtawith I.M. Munim, for the Appellant;

Judgement

DR. B.P. SARAF, J.

By this reference under s. 256(1) of the IT Act, 1961, the Tribunal has referred the following questions of law to this Court for opinion at the. instance of the Revenue..

1. Whether, on the facts and in the circumstances of the case, and in law, the Tribunal was right in holding that the business of construction carried on by the assessee is an ''Industrial undertaking ?

2. Whether, on the facts and in the circumstances of the case, the business of construction (of this industrial undertaking) is by itself not eligible to investment allowance under s. 32A(2)(b)(iii)?

3. Whether, on the facts and in the circumstances of the case and in law, the assessee''s business activity is also business of construction of thing to be entitled to investment allowance under s. 32A(2)(b)(iii)?

4. Whether, on the facts and in the circumstances of the case and in law, the Tribunal was right in holding that the dumpers used by the assessee in the

execution of civil engineering contract work were not "road transport vehicles" so as to fall within the proviso (b) to s. 32A(1), and granting investment allowance of Rs. 1, 19,930 thereon?

5. Whether, on the facts and in the circumstances of the case and in law, the Tribunal was right in holding that the amount in credit in the foreign exchange reserve account represented profit or gain of the assessee when the foreign currency had been converted into rupees at the rate prevailing at the end of the year only for account purposes, although it had remained outside India, when such foreign currency had not been adjusted during this year, and, on these premises, deleting the addition of Rs. 4,59,098T''

2. So far as question Nos. 1 to 4 are concerned, learned counsel for the parties are agreed that the controversy therein now stands concluded in favour of the Revenue by the decision of the Supreme Court in Commissioner of Income Tax, Orissa and Others Vs. N.C. Budharaja and Company and Others,

3. Following the above decision, we answer first four questions as below :

Question No. 1: in the negative i.e., in favour of the Revenue.

Question No. 2: in the affirmative i.e., in favour of the Revenue and against the assessee.

Question No. 3: in the negative- i.e., in favour of the Revenue and against the assessee.

Question No. 4: in the negative i.e., in favour of the Revenue and against the assessee.

4. The only question that requires consideration is question No. 5. The material facts necessary for deciding the controversy in this question, briefly stated, are as follows:

The assessee had taken up some contract works in the middle east countries. Against such contracts, advances were received by the assessee, which had to be adjusted against the running bills submitted by the assessee from time to time. At the end of the accounting year relevant to the asst. yr. 1979-80, certain foreign currency had remained in reserve and for account purposes, they were converted into Indian rupee at the prevailing rate. The amount of foreign exchange/reserve in terms of Indian rupee was Rs. 4,59,098. The ITO brought this amount to tax in the hands of the assessee. The assessee appealed to the AAC. The AAC deleted the addition, as he was of the opinion that the credit balance in the foreign exchange reserve account, in the facts and circumstances of the case, did not represent any profit or gain taxable under the Act. The order of the AAC was confirmed by the Tribunal. Hence, this reference at the instance of the Revenue.

5. We have heard Mr. R.V. Desai, learned counsel for the Revenue, as also Mr. SA. Mehta, learned counsel for the assessee. The uncontroverted factual position

is that the amount in question lying in the exchange reserve account did not even belong to the assessee. It was a part of the amount received by the assessee from the parties in middle east by way of advance to be adjusted against the running bills. Till it was adjusted against the running bills, it did not belong to the assessee. The conversion into Indian rupee at the end of the year obviously was only for account purposes. That being so, the said amount cannot be regarded as income of the assessee. In these facts and circumstances of the case, the Tribunal, in our opinion, was correct in its conclusion that until these amounts were adjusted against future bills, question of regarding the same as income and assessing to tax cannot arise. Accordingly, we answer question No. 5 in the affirmative i.e., in favour of the assessee and against the Revenue.

6. Reference disposed of accordingly with no order as to costs.

