
(1997) 01 KL CK 0042
In the High Court Of Kerala
Case No : IT Ref. No. 74 of 1994

COMMISSIONER OF INCOME TAX

APPELLANT

Vs

A. V. THOMAS and CO. LTD.

RESPONDENT

Date of Decision : 10-01-1997

Acts Referred:

Income Tax Act, 1961 — Section 30, 31, 32, 33, 34

Citation : (1997) 142 CTR 364

Hon'ble Judges : Smt. K. K. Usha, J; K. K. Usha, J

Bench : Division Bench

Judgement

SMT. K. K. USHA, J. :

At the instance of the Revenue the Tribunal, Cochin Bench has referred the following questions arising out of the order of the Tribunal dt. 30th October, 1992 in ITA No. 736/Coch/1987 for the opinion of this Court :

"1. Whether, on the facts and in the circumstances of the case, -

(i) the expenditure in respect of repairs and insurance of motor cars can be included in the expenditure incurred on running and maintenance of motor cars for purpose of restriction u/s 37(3A) of the IT Act ?

(ii) the Tribunal is right in law in holding "repairs and insurance are governed by Section 31 and taxes are regulated u/s 30 such expenditure cannot be construed as running and maintenance expenditure of motor cars described u/s 37(3A) of the Act ?

2. Whether, on the facts and in the circumstances of the case and also on an interpretation of the relevant provisions, the assessee is entitled to deduction u/s 80HHC of the IT Act, 1961 ?"

The relevant facts are as follows : The assessee is a company engaged in sale and distribution of pesticides, running of a steamer agency, export of cardamom etc. For the asst. yr. 1985-86 while completing the assessment the ITO

disallowed certain amounts relating to the cost of repairs and insurance premium of motor cars from the expenditure by applying the provisions u/s 37(3A) of the IT Act, 1961. The assessee successfully challenged the disallowance before the CIT(A). On an appeal filed by the Revenue, the Tribunal upheld the view taken by the Ist appellate authority that the provisions contained u/s 37(3A) can be applied only in regard to the expenditure covered by an allowance u/s 37(1) of the IT Act and not in respect of the cost of repairs, insurance etc. of the car which are allowed u/s 31 of the IT Act.

2. The assessee had also claimed a deduction u/s 80HHC to the extent of Rs. 1,52,764 on the export of cardamom. This claim was disallowed by the assessing authority on the ground that since the net result of cardamom export was loss, no deduction can be claimed as per the provisions of Section 80AB. On appeal by the assessee, CIT(A) took the view that u/s 80HHC the only requirement was that there should be an export of commodities other than the prohibited variety and on such exports, the assessee had received convertible foreign exchange. The Tribunal upheld the above view in the appeal filed by the Revenue.

3. It is not disputed before us that the claim regarding expenditure incurred by the assessee for repair and insurance of the car would come under s. 31 of the IT Act, 1961. But according to the learned standing counsel for the Revenue, the non obstante clause in Section 37(3A) would exclude the provisions contained u/s 31(1) and therefore the provisions contained u/s 37(3A) would be applicable in the case of the assessee. On the other hand, the learned counsel for the assessee would contend that Section 37(3A) would take in only those matters which come u/s 37(1) and not under s. 31. In order to appreciate rival arguments it is necessary to refer to the relevant provisions of law. Sec. 31 reads as follows :

"31. Repairs and insurance of machinery, plant and furniture. - In respect of repairs and insurance of machinery, plant or furniture used for the purposes of the business or profession, the following deductions shall be allowed :

- (i) the amount paid on account of current repairs thereto;
- (ii) the amount of any premium paid in respect of insurance against risk of damage or destruction thereof".

In view of the definition of the term plant u/s 43(3) a car is also a plant. If that be so, the amount paid for repairs and towards insurance policy for car can be claimed as deduction. Section 30 - 36 deal with different types of deductions that can be claimed in respect of expenditure. Sec. 37 is in the nature of residuary provision, which reads as follows :

"37. General. - (1) Any expenditure (not being expenditure of the nature described in Section 30 - 36 and not being in the nature of capital expenditure or personal expenses of the assessee), laid out or expended wholly and exclusively for the purposes of the business or profession shall be allowed in computing the

income chargeable under the head "profits and gains of business or profession".

A reading of the above provision would make it clear that the deductions referred in Section 30 - 36 are excluded from the purview of Section 37(1). Now we will go to Section 37(3A) and the relevant portions of s. 37(3B). Sec. 37(3A) reads as follows :

"Notwithstanding anything contained in sub-s. (1), where the expenditure or, as the case may be, the aggregate expenditure incurred by an assessee on any one or more of the items specified in sub-s. (3B) exceeds one hundred thousand rupees, twenty per cent of such excess shall not be allowed as deduction in computing the income chargeable under the head "profits and gains of business or profession".

Relevant portion of Section 37(3B) reads as follows :

"The expenditure referred to in sub-s. (3A) is that incurred on -

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(ii) running and maintenance of aircraft and motor cars; or

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(c) expenditure on running and maintenance of aircraft and motor cars shall include -

(i) expenditure incurred on chartering any aircraft and expenditure on hire charges for engaging cars plied for hire;

(ii) conveyance allowance paid to employees and, where the assessee is a company, conveyance allowance paid to its directors also".

4. We are unable to accept the contention raised by the Revenue that exclusion of Section 30 - 36 u/s 37(1) is set at naught by the non obstante clause in Section 37(3A). A reading of Section 37(1) would make it clear that this section is intended to take in expenditure which are not covered by Section 30 - 36. The provisions contained under sub-s. (3A) would apply only to those items of expenditure which are not covered by ss. 30 - 36, but covered by Section 37(1). The non obstante clause in sub-s. (3A) relates only to the computations of the allowance referred in Section 37(1) in respect of expenditure covered by Section 37. A reference to the provisions under sub-s. (3B) would make the above position further clear. The expenditure covered by Section 31 relates to repairs and premium paid in respect of insurance of cars, whereas what is contemplated

under sub-s. (3B) is expenditure incurred on running and maintenance of motor cars which is entirely different. We are therefore of the view that the Tribunal has correctly held that Section 37(3A) has no application in the case of expenditure incurred for repairing car and the premium paid for its insurance. Our above view is fortified by the decisions of High Courts of Bombay and Calcutta in Commissioner of Income Tax Vs. Chase Bright Steel Ltd. (No. 1), , Commissioner of Income Tax Vs. Tungabhadra Industries Ltd., and Commissioner of Income Tax Vs. Price Waterhouse, .

5. The second question relates to the claim put forward by the assessee u/s 80HHC of the IT Act, 1961 for a sum of Rs. 1,52,764 on the turnover relating to the export of cardamom. As per the returns, the assessee had suffered loss in the business of export of cardamom. The assessing authority disallowed the claim. It took the view that as per the provisions of Section 80AB any deduction u/s 80 can be allowed only if the gross total income includes any income of the nature specified in that section. Since the export has resulted only in loss, no amount can be allowed as a deduction under s. 80HHC in view of the provisions of Section 80AB. The first appellate authority took the view that Section 80AB has no application when claim is put forward u/s 80HHC. The assessee has satisfied all the conditions necessary u/s 80HHC before its amendment w.e.f. 1st April, 1986 and therefore it is entitled to deduction to the extent of Rs. 1,52,764. The Tribunal, on appeal by the Revenue agreed with the first appellate authority and held that even after the amendment which came into force from 1st April, 1986 the assessee is entitled to deduction u/s 80HHC.

6. It is contended before us by the learned standing counsel for the Revenue that since the expenditure incurred by the assessee in its business of export of cardamom is higher than the income, there is no scope for exemption. Section 80AB would show that each business has to be considered separately. Reliance was placed by the Revenue on a decision of the High Court of Karnataka in CIT vs. H.M.T. Ltd. (1993) 203 ITR 811 (Kar)

7. Section 80AB and Section 80HHC come under Chapter VI-A of the IT Act, 1961 dealing with deduction to be made in computing total income. While s. 80AB comes under the heading A-General, Section 80HHC, comes under the head deductions in respect of certain incomes. Section 80AB and s. 80HHC read as follows :

"80AB. Deductions to be made with reference to the income included in the gross total income. - Where any deduction is required to be made or allowed under any section (except s. 80M) included in this Chapter under the heading "C - Deductions in respect of certain incomes" in respect of any income of the nature specified in that section which is included in the gross total income of the assessee, then, notwithstanding anything contained in that section, for the purpose of computing the deduction under that section, the amount of income of that nature as computed in accordance with the provisions of this Act (before making any deduction under this Chapter) shall alone be deemed to be the

amount of income of that nature which is derived or received by the assessee and which is included in his gross total income".

"80HHC. Deduction in respect of export turnover. - (1) Where the assessee, being an Indian company or a person (other than a company), who is resident in India, exports out of India during the previous year relevant to an assessment year any goods or merchandise to which this section applies, there shall, in accordance with and subject to the provisions of this section, be allowed, in computing the total income of the assessee, the following deductions, namely :

(a) a deduction of an amount equal to one percent of the export turnover of such goods or merchandise during the previous year; and

(b) a deduction of an amount equal to five percent of the amount by which the export turnover of such goods or merchandise during the previous year exceeds the export turnover of such goods or merchandise during the immediately preceding previous year.

(2)(a) This section applies to all goods or merchandise (other than those specified in clause (b) if the sale proceeds of such goods or merchandise exported out of India are receivable by the assessee in convertible foreign exchange.

(b) The goods or merchandise referred to in clause (a) are the following, namely :

(i) agricultural primary commodities, not being produce of plantations;

(ii) mineral oil;

(iii) minerals and ores; and

(iv) such other goods or merchandise as the Central Government may, by notification in the Official Gazette, specify in this behalf.

(3) No deduction under cl. (b) of sub-s. (1) shall be allowed unless the assessee had, during the immediately preceding previous year, exported out of India goods or merchandise to which this section applies.

Explanation - For the purpose of this section. -

(a) "convertible foreign exchange" means foreign exchange which is for the time being treated by the Reserve Bank of India as convertible foreign exchange for the purposes of the FERA, 1973 (46 of 1973), and any rules made thereunder;

(b) "export turnover" means the sale proceeds of any goods or merchandise exported out of India, but does not include freight or insurance attributable to the transport of the goods or merchandise beyond the customs station as defined in the Customs Act, 1962 (52 of 1962)".

8. A mere reading of s. 80AB would show that computation of deduction is geared to the amount of income, but coming to the provisions contained under s.

80HHC quantification of the amount of deduction is geared to the export turnover and not to the income. The term export turnover is defined as sale proceeds of any goods etc. exported out of India. Apparently s. 80HHC was introduced by Finance Act, 1983 to encourage export. We are therefore in full agreement with the view taken by the Tribunal that the assessee is entitled to claim deduction under s. 80HHC even if it has suffered loss in its business of export of cardamom. The decision of the Karnataka High Court is of no help to the Revenue. It was a case where provisions contained under ss. 80AB, 80J and 80HH were considered. It was held that for the purposes of s. 80J and 80HH profits and gains of new undertakings are not commercial profits but only such profits as are computed in the manner laid down under the Act in pursuance of s. 80AB as if each undertaking was a separate assessee. In s. 80HH the deduction has to be quantified with reference to profits and gains and in s. 80J with reference to the capital employed and not with reference to turnover as in the case of s. 80HHC. Therefore the above decision has no application to the present case.

9. In the light of the above discussion, we answer question No. 1(i) in the negative against the Revenue and in favour of the assessee. Question No. 1(ii) in the affirmative against the Revenue and in favour of the assessee. Question No. 2 in the affirmative against the Revenue and in favour of the assessee.