
(2002) 07 RAJ CK 0042

In the Rajasthan High Court

Case No : IT Reference No. 19 of 1994 9 July 2002

Commissioner of Income Tax

APPELLANT

Vs

Arawali Construction Co. (P) Ltd.

RESPONDENT

Date of Decision : 09-07-2002

Acts Referred:

Income Tax Act, 1961 — Section 256, 32, 35AB

Citation : (2002) 124 TAXMAN 146

Hon'ble Judges : Y.R. Meena, J;Shashi Kant Sharma, J

Bench : Full Bench

Advocate : R.B. Mathur, for the Revenue, for the Appellant;

Judgement

On an application u/s 256(1) of the Income Tax Act, 1961 (hereinafter referred to as "the Act"), the Tribunal has referred the following question for our opinion :

"Whether, on the facts and in the circumstances of the case, the Tribunal was justified in treating the expenditure in the acquisition of software of Rs. 1,38,360 as of revenue nature ?"

2. The assessee-company had acquired computer software which had cost of Rs. 1,38,360 which the assessee claimed as the revenue expenditure. However, the assessing officer had taken it as a capital expenditure and allowed depreciation as per rules. In appeal before the Commissioner (Appeals), the Commissioner (Appeals) has taken a view that the expenditure incurred on technical know-how is a revenue expenditure. In appeal before the Tribunal, the Tribunal decided the issue against the revenue relying upon the decisions of the Delhi and Bombay High Courts and confirmed the view taken by the Commissioner (Appeals).

None appeared on behalf of the assessee. Heard the learned counsel for the revenue.

3. The learned counsel for the revenue, Mr. Mathur, submits that the computer software is a programme and the expenditure incurred on computer software

used as technical know-how in the mining operation has been treated as capital expenditure. He placed reliance on the decision of the Apex Court in the case of CIT v. Elecon Engineering Co. Ltd., (1987) 166 ITR 66 (SC) and a decision of the Bombay High Court in the case of Commissioner of Income Tax Vs. Premier Automobiles Ltd.,

During the course of argument, the assessing officer has issued a notice to the assessee to explain as to why the expenditure incurred on computer software should not be treated as capital expenditure. The assessee's counsel submitted the following written explanation which reads as under:

"During the accounting year 1984-85, the assessee has purchased the computer programme from M/s. Hindustan Computers Ltd. This computer programme is in fact a revenue expenditure being debited to profit and loss account. The computer software which is in fact a consultancy fee being paid to Hindustan Computers Ltd. for the programme required for the data analysis for the mining purpose, has been purchased. This is not an asset, as stated by you during the course of discussion, as the life of this is restricted to shorter period, for a particular time only this thing is required and again they have to get the programme when they get another nature of work.... whereas software is just a programme and it cannot be called a capital expenditure."

We have seen the aforesaid explanation. The assessee claimed that the expenditure was debited in the profit and loss account as the revenue expenditure and it was a software programme and nothing but a consultancy fee being paid to Hindustan Computers Ltd. The assessing officer noticed that in the agreement, nowhere it is stated that amount has been paid for consultancy fee and in fact it is a outright purchase of computer programme which relates to technical know-how. It is an asset of capital nature, therefore, treating it as an asset, allowed depreciation admissible in rule.

4. In appeal before the Commissioner (Appeals), the Commissioner (Appeals) has considered the decision of the Bombay High Court in the case of Commissioner of Income Tax Vs. Borosil Glass Works Ltd., and a decision of the Delhi High Court in the case of Shriram Refrigeration Industries Ltd. Vs. Commissioner of Income Tax, Delhi-I, , and allowed the claim of the assessee looking to the nature of expenditure as revenue. In appeal before the Tribunal, the Tribunal has also gone by these decisions and further held that the provision of section 35AB of the Act has no application.

5. In Shriram Refrigeration Industries Ltd.'s case (supra), there was collaboration agreement, licence was given to the assessee to manufacture and sell a particular item. There was no transfer or parting with secret process and technical knowledge to the assessee and a lump sum payment was made in addition to royalty based on sale price of manufactured articles. It was treated as the revenue expenditure. When the technical know-how has not been transferred in the case of the Delhi High Court, that has no application as in the case of

technical know-how, i.e., programme of technical know-how has been transferred by way of feeding of the programme in computer to make use in the mining operation, therefore, the Delhi High Court's case has no application (sic).

6. In *Borosil Glass Works Ltd.*'s case (supra), the Bombay High Court has treated acquisition of technical know-how as the revenue expenditure. Mr. Mathur brought to our notice a latest decision on this issue whether technical know-how is a capital expenditure or a revenue expenditure, in the case of *Premier Automobiles Ltd.* (supra) wherein the Bombay High Court has taken the view that the technical know-how is a capital expenditure and expenses incurred on technical know-how are entitled for depreciation u/s 32.

7. In *Elecon Engineering Co. Ltd.*'s case (supra), their Lordships have considered the issue that in an in collaboration agreement the assessee acquired drawings and patterns for the manufacture of worm reduction gear units and conveyor idlers were treated as plant or machinery and held that depreciation is allowable in relation to drawings and patterns. The department has preferred an appeal, the appeal has been dismissed by the Hon'ble Supreme Court.

8. The fact on record is that the payment of Rs. 1,38,360 was not made as consultancy fee to Hindustan Computers Ltd., in fact, the payment was made for outright sale of "computer software" which is used as technique in mining operations. The finding of the Commissioner (Appeals) was that the acquisition of software cannot be treated to be an asset of enduring nature. If the programme is used in one mining to another mining operation, why it should not be treated as capital asset and expenditure on that, capital expenditure. Considering these facts and decision of their Lordships and later decision of the Bombay High Court, in our view, the acquisition of technical know-how is a capital expenditure, therefore, the assessing officer has rightly treated the expenditure on acquiring the computer software as expenditure of capital nature and rightly allowed depreciation as per rules.

9. In the result, we answer the reference in the negative, i.e., in favour of the revenue and against the assessee. The reference so made stands disposed of accordingly.