(1996) 02 KL CK 0033

In the High Court Of Kerala

Case No : O.P. No. 11680 of 1995

Commissioner of Income Tax — APPELLANT

Vs

Asian Techs Ltd. — RESPONDENT

Date of Decision : 23-02-1996

Acts Referred:

Income Tax Act, 1961 — Section 256, 256(2), 80HH, 80I, 80J

Citation : (1997) 226 ITR 672

Hon'ble Judges : V.V. Kamat, J;G. Sivarajan, J

Bench : Division Bench

Advocate : P.K. Ravindranatha Menon and N.R.K. Nair, for the Appellant;

Judgement

G. Sivarajan, J.—This original petition has been filed by the Commissioner of Income Tax, Cochin, u/s 256(2) of the Income Tax Act, 1961, seeking reference of the following questions of law, as arising out of the appellate order dated June 4, 1993 (vide annexure "C", of the Income Tax Appellate Tribunal, Cochin Bench :

"1. Whether, on the facts and in the circumstances of the case, the Tribunal is right in law and fact in holding--

(i) the assessee is an industrial undertaking ;

(ii) the assessee is entitled to get deduction under Sections 80-I, 80HH and 80J in respect of profits referable to manufacture of any article or product or thing in the course of its construction activities and are not the above finding and decision wrong and unreasonable ?"

2. The assessee is a company doing business in engineering contracts. In the assessment for the year 1983-84, the assessee claimed deduction under Sections 80-I, 80HH and 80J of the Income Tax Act, 1961. The claim was made on the basis that the assessee for the purpose of executing the work of construction of a tunneling system and a school building had manufactured or produced articles or things which are used in the execution of such work and that

this amounted to manufacture and construction for the purpose of the claim made under the aforesaid three sections. The assessing authority rejected the said claim on the basis of the decision taken for the earlier assessment years to the effect that the assessee is not an industrial undertaking. In appeal, the Commissioner of Income Tax (Appeals) confirmed the said finding of the assessing authority. The matter was taken in appeal before the Income Tax Appellate Tribunal, Cochin Bench. The Appellate Tribunal relied on the decision of a five member Bench of the Tribunal reported in R.M. Enterprises v. First ITO [1993] 199 ITR 40, where the Tribunal had dealt with the question as follows (headnote) :

"If, however, such undertaking also manufactures or produces articles or things which are used in the building construction activity, it would be entitled to deduction contemplated under that section in respect of profits and gains referable to such activity. Thus, the assessees would be entitled to claim deduction u/s 80-I in respect of profits and gains derived from the manufacture or production of frames, doors and windows, as well as cement concrete slabs and other allied articles, which are used in the building construction activity.

Therefore, the words ''article or thing'' as used in Section 80-I refer to movables only and an assessee would not be entitled to deduction u/s 80-I in respect of profits and gains arising out of the construction of buildings as such."

3. It held that the assessee is entitled to the benefits of the aforesaid provisions.

4. At this juncture, it is relevant to note that the very same question has come up for consideration before the High Court of Bombay in Commissioner of Income Tax Bombay City-I Vs. N.U.C. Private Ltd., , where the Bombay High Court has taken the view that an assessee manufacturing similar products cannot be held to be an industrial company for the purpose of Section 2(7)(d) of the Finance Act, 1966. It is also relevant to note that a similar question has been raised before the Supreme Court in CIT v. N.C. Budharaja and Co. [1993] 204 ITR 413, where that court at page 425 has referred to a similar contention raised before it and left open the question with the following observations :

"We need not express any opinion on the question what would be the position if the respondent had claimed the benefit of Section 80HH on the value of the articles manufactured or produced by him which articles have gone into/ consumed in the construction of the dam."

5. It is submitted by counsel on either side that there is no authoritative pronouncement on this question either by this court or by the Supreme Court. Learned senior counsel appearing for the Department contended that this is a very important question arising for consideration in various cases on which pronouncement by this court is absolutely necessary.

6. In view of the fact that the very same question has been considered by the Bombay High Court and also the fact that the question was left open by the

hon''ble Supreme Court, we think that this is a very important question of law arising for consideration in this case.

7. We, accordingly, direct the Income Tax Appellate Tribunal, Cochin Bench, Ernakulam, to state a case and to refer the question of law set out at the outset for decision of this court. There will be a further direction to the Income Tax Appellate Tribunal to forward the statement of case within a period of three months from the date of receipt of a copy of this judgment.

8. Communicate a copy of this judgment to the Income Tax Appellate Tribunal, Cochin Bench, for passing consequential orders.