

(2001) 07 DEL CK 0117

In the Delhi High Court

Case No : ITR No"s. 246 and 247 of 1982

Commissioner of Income Tax

APPELLANT

Vs

Bhagat Construction Co.

RESPONDENT

Date of Decision : 16-07-2001

Acts Referred:

Finance Act, 1979 — Section 2(7)

Income Tax Act, 1961 — Section 154, 256(1), 32A

Citation : (2001) 171 CTR 648 : (2002) 253 ITR 177 : (2001) 119 TAXMAN 375

Hon'ble Judges : Dr. Arijit Pasayat, C.J.;D.K. Jain, J

Bench : Division Bench

Advocate : R.C. Pandey, Prem Lata Bansal and Ajay Jha, for the Appellant; B.B. Ahuja and Anurag Chawla, for the Respondent

Judgement

1. At the instance of the Revenue, the following questions have been referred for the opinion of this court by the Income Tax Appellate Tribunal, Delhi Bench (in short, "the Tribunal"), u/s 256(1) of the Income Tax Act, 1961 (in short, the "Act") :

"1. Whether, on the facts and in the circumstances of the case, the Tribunal is justified in holding that the assessed-company is an industrial company as defined in Section 2(7)(c) of the Finance Act, 1979, and if so whether the assessed-company is entitled to a concessional rate of tax ?

2. Whether, on the facts and in the circumstances of the case, the Tribunal is correct in law in upholding the order of the Commissioner of Income Tax (Appeals) deleting the addition of Rs. 1,60,128 made by the Income Tax Officer on account of investment allowance ?"

2. The dispute relates to the assessment year 1979-80 for which the previous year ended on October 31, 1978.

3. The factual position in a nutshell is as follows :

The assessed derived income from executing civil engineering works at Bokaro and sub-letting contracts in Delhi. It claimed to be an industrial company within the meaning of Section 2(7)(c) of the Finance Act, 1979 (in short, "the Finance Act"). The said claim was rejected on the ground that the view expressed by the Tribunal in other cases on which the assessed placed reliance was not accepted and the decision of this court in *National Projects Construction Corporation Ltd. Vs. Commissioner of Wealth Tax*, was not applicable to the facts of the case. The Income Tax Officer refused to recognise the assessed as an industrial company, but allowed investment allowance u/s 32A. Subsequently, the said allowance was withdrawn by order passed u/s 154 of the Act. The assessed preferred appeals before the Commissioner of Income Tax (Appeals) (in short, "the CIT(A)"), questioning the denial of the claim made to treat it as industrial company and the investment allowance withdrawn. Placing reliance on several decisions, more particularly, the decision in *National Projects Construction Corporation Ltd. Vs. Commissioner of Wealth Tax*, , the claim of the assessed was allowed. Consequently, the relief withdrawn was held to be allowable. The matter was carried in appeals before the Tribunal by the Revenue. The Tribunal referred to some earlier decisions in the cases of *Ahuja Kashyap Put. Ltd.* and *Saraswati Builders (Pvt.) Ltd.*, and upheld the views of the Commissioner of Income Tax (Appeals). Being moved for reference, the questions set out above have been referred for the opinion of this court.

4. Learned counsel for the Revenue placed reliance on a decision of this court in *Bhagat Construction Co. (P) Ltd. Vs. Commissioner of Income Tax*, in the assessed's own case for 1985-86 and submitted that the views of the Commissioner of Income Tax (Appeals) and the Tribunal cannot be maintained. Learned counsel for the assessed submitted with reference to the decision of the apex court in *Minocha Bros. Pvt. Ltd. Vs. Commissioner of Income Tax*,) , that the view expressed by the Commissioner of Income Tax (Appeals) and the Tribunal are on terra firma.

5. It is to be noted that the decision of the apex court in *Minocha Bros. Pvt. Ltd. Vs. Commissioner of Income Tax*, was in respect of a decision of this court in *Commissioner of Income Tax, Delhi-I Vs. Minocha Brothers P. Ltd.*,) . We find from the case of *Minocha Bros. (P.) Ltd.*'s case as decided by the apex court that the determinative factor would be the percentage of the total income attributable to manufacturing, processing and mining activities undertaken by the assessed. If it is not less than 51 per cent, it has to be treated as industrial company. The assessed with reference to certain observations made by the Commissioner of Income Tax (Appeals) and the Tribunal claimed that there was a positive finding in this regard. We find that the Commissioner of Income Tax (Appeals) and the Tribunal referred to some profits which were held to be relatable to manufacturing activities in terms of the decision in *N. C. Budharaja's* case which was decided by the Orissa High Court, i.e., *Commissioner of Income Tax Vs. N.C. Budharaja and Company*, . The said decision was overruled by the apex court in *Commissioner of Income Tax, Orissa and Others Vs. N.C. Budharaja and*

Company and Others, . The said decision was relied upon by this court in the assessed's case as referred to above. In the circumstances, we feel it would be appropriate to direct the Tribunal to rehear the appeal and to find out on facts as to whether or not 51 per cent, of the total income is attributable to manufacturing, processing and mining activities. While doing so, the decisions in Commissioner of Income Tax, Orissa and Others Vs. N.C. Budharaja and Company and Others, and Minocha Bros. Pvt. Ltd. Vs. Commissioner of Income Tax, as decided by the apex court shall be kept in view. References are accordingly disposed of.

6. The answer to the basic question, i.e., whether assessed is an industrial company would have effect on other questions as to grant of investment allowance. Needless to say all relevant aspects shall be taken note of while dealing with this question.