
(1991) 05 KL CK 0009

In the High Court Of Kerala

Case No : Income-tax References No's. 134 and 135 of 1988

COMMISSIONER OF Income Tax

APPELLANT

Vs

BHAGEERATHA ENGINEERING LTD.

RESPONDENT

Date of Decision : 03-05-1991

Acts Referred:

Income Tax Act, 1961 — Section 256, 32A, 33, 54D, 80HH

Citation : (1992) 99 CTR 204 : (1991) 3 ILR (Ker) 482 : (1992) 193 ITR 674

Hon'ble Judges : K. S. Paripoornan, J;K. S. Paripooranan, J

Bench : Division Bench

Judgement

K. S. PARIPOORNAN J. - At the instance of the Revenue, the Income Tax Appellate Tribunal (for short, "the Tribunal") has referred the following question of law for the decision of this court in the above two cases :

"Whether, on the facts and in the circumstances of the case, the assessee is entitled to investment allowance u/s 32A of the Income Tax Act, 1961 ?"

The respondent is a company engaged in the business of undertaking building contracts. We are concerned with the assessment years 1980-81 and 1981-82, the previous years ending on March 31, 1980, and March 31, 1981, respectively. In the previous years relating to the assessment years 1980-81 and 1981-82, the assessee had acquired plant and machinery and claimed investment allowance of Rs. 29,67,024 and Rs. 11,44,835, respectively, u/s 32A of the Income Tax Act. The Income Tax Officer denied the relief. The grounds for denial of the relief were two-fold : (1) the machinery had not been installed in an "industrial undertaking" for the purpose of business of construction, manufacture or production of any article or thing since the business of the assessee was undertaking building contracts only which could not be considered as an "Industrial undertaking", and (2) the assessee was only carrying on contracts for others. In the appeal, the Commissioner of Income Tax (Appeals), held thus :

"On a plain reading of section 32A as it stood during the relevant period, it is

clear that an assessee engaged in the business of construction should get the benefit of investment allowance in respect of plant or machinery used for the purpose of construction. The enlargement of the scope of the section by conferring the benefit on construction business has been correctly spelt out in the Notes on Clauses accompanying the Finance Bill. The relevant observations can be seen at page 153 (Statutes) of 107 ITR, wherein it has been stated that sub-clause (a) seeks to enlarge the scope of the existing provision and provide that investment allowance will be granted in respect of machinery and plant installed for the purposes of business of construction, manufacture or production of all articles and things, except articles and things specified in the list in the Eleventh Schedule."

He concluded that the assessee is entitled to investment allowance in respect of the machinery and plant installed and used mainly for the purpose of business of construction (paragraph 10 of the order dated January 15, 1985). The Revenue filed appeals from the aforesaid common order, rendered by the Commissioner of Income Tax (Appeals) for both the years before the Tribunal. The Tribunal, by a common order dated January 30, 1987, found that the respondent assessee (company) was engaged in the production of reinforced concrete slabs and boulders of various forms which were used for construction of tunnels, dams, etc., and, therefore, the entire activity of the assessee amounted to manufacture and processing of various materials to be used in its construction activities. The Tribunal thus found that the assessee was engaged in the manufacture and processing of goods and as such an industrial company entitled to investment allowance. Aggrieved by the aforesaid decision of the Tribunal dated January 30, 1987, the Revenue filed two applications u/s 256 (1) of the Income Tax Act to refer certain question of law for the decision of this court. Three questions were formulated for both the years to be referred to this court. They are similarly worded. They are available at pages 35 and 38 of the paper book. They are as follows :

"(1) Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in finding that the assessee is engaged mainly in the manufacture or processing of goods and as such an industrial company ?

(2) Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in finding that the assessee-company is an industrial company ?

(3) Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in finding that the assessee is entitled to investment allowance u/s 32A ?"

But the Tribunal has referred for the decision of this court only the last question which has been extracted earlier herein.

We heard counsel for the Revenue, Mr. P. K. R. Menon, as also counsel for the assessee, Mr. G. Sarangan and Mr. Pathrose Mathai. Counsel for the Revenue referred us to the history of the legislation which led to the enactment of section

32A in the Income Tax Act. Reliance was placed on the Finance Ministers Budget Speech for 1976-77, printed at [1976] 102 ITR 95. The portion of the speech relied on is as follows :

"The present scheme of investment allowance will facilitate investment in priority industries and reduce the dependence of the corporate sector on public financial institutions."

Proceeding further, counsel for the Revenue placed reliance on the Finance Ministers Second Budget Speech for 1977-78 printed at [1977] 107 ITR 66 and Notes on Clauses to the Finance (No. 2) Bill, 1977, printed at [1977] 107 ITR 152 and contended that the then existing provision was to enlarge the scope of the law to priority industries and all industries will not be entitled to the benefit of the provision. It was argued that, on the terms of section 32A(2)(b)(iii) of the Act, the assessee should prove that the new machinery or plant is installed in an "industrial undertaking" and that it should be so done for the purpose of business of construction, manufacture or production of an article or thing. In this case, the assessee is engaged in the business of building contracts. It is engaged in the construction of tunnels and other civil works. It does not own any of the things which it constructs as it simply lends its services in the construction of the things. The end products of the services lent by the company do not belong to the company. It cannot be said that the assessee is an industrial undertaking, much less that the plant or machinery is installed for the purpose of business of manufacture or production of any article or thing. According to counsel for the Revenue, though the language of section 32A(2)(b)(iii) of the Act is wide enough to state that the new machinery or plant is to be installed for the purpose of business of construction, manufacture or production of any article, it should really be confined to an occupation or activity, vocation, business or trade an industrial undertaking. Since the respondent is engaged only in the business of construction, there is no business of manufacture or production of any article or thing and so the provisions of section 32A(2)(b)(iii) of the Act are not attracted. On the other hand, counsel for the respondent-assessee submitted that the respondent-construction company is engaged in the construction of dams, tunnels, etc. It is an integrated business, involving complicated activities and, in the course of its carrying of its construction work, the assessee is manufacturing and processing various materials to be used in its construction activities. It has been so found by the Tribunal. The word "industrial undertaking" is not defined in the Income Tax Act. The word should receive the meaning given to it in common parlance. The reference to the Speech of the Finance Minister reported in [1976] 102 ITR 95 and [1977] 107 ITR 66 or the Notes on Clauses of the Finance (No. 2) Bill at [1977] 107 ITR 152 are not relevant and there is no basis to contend that section 32A of the Income Tax Act was enacted only to give benefit to low priority industries and there is no intention to include all industries. It was submitted that there is no indication to show that section 32A of the Act is confined to priority industry alone. Counsel argued that the word "industrial undertaking" should be construed in a liberal manner and it would only mean

that the enterprise or venture should partake of the character of a business and it should take within its fold any project or business a person may undertake. Placing reliance on the Notes on Clauses of the Finance (No. 2) Bill, 1977 relating to section 32A of the Income Tax Act, printed at [1977] 107 ITR 53, counsel contended that the object was to enlarge the scope of the existing provision and as rightly pointed out by the Commissioner of Income Tax (Appeals), investment allowance is to be granted in respect of machinery and plant installed for the purpose of business of construction, manufacture and production of any article and thing, not specified in the list in the Eleventh Schedule. Counsel for the assessee stressed that the Tribunal, after adverting to the nature of various activities carried on by the assessee, has entered a finding of fact to the effect that the assessee is an industrial undertaking. It was also found that since the machinery was used in an industrial undertaking for the business of construction, manufacture or production of articles or things, the assessee is entitled to investment allowance u/s 32A of the Act. According to counsel the finding of fact entered by the Tribunal on the basis of materials before it, that the assessee is an "industrial undertaking", has not been challenged by framing an appropriate question. So long as the said finding of fact is not challenged, the machinery or plant used admittedly is an "industrial undertaking" for the purpose of construction, manufacture or production of articles or things is entitled to investment allowance filed u/s 256(1) of the Act, the Revenue had challenged the finding entered by the Tribunal that the assessee is engaged mainly in the manufacture or processing of goods and as such an industrial company, and the said finding was challenged specifically by framing questions Nos. 1 and 2, appearing at pages 35 and 38 of the paper book. The Tribunal declined to refer those two questions. The only question referred is to the following effect :

"Whether, on the facts and in the circumstances of the case, the assessee is entitled to investment allowance u/s 32A of the Income Tax Act, 1961 ?"

The finding of fact entered by the Tribunal that the assessee is engaged mainly in the manufacture or processing of goods and as such an industrial undertaking stands. The challenge, though initially attempted in the application filed section 256 (1) of the Act, has not been pursued. On the basis of the findings entered by the Tribunal, the conclusion arrived at by it that the assessee is entitled to investment allowance u/s 32A is unassailable. Even on merits, the Tribunal was justified in holding that the assessee is an industrial undertaking. Counsel argued that the Tribunal was justified in holding that the assessee is entitled to investment allowance u/s 32A of the Income Tax Act.

Having heard counsel at length, we are of the view that the reasoning and conclusion of the Tribunal in holding that the assessee is entitled to investment allowance u/s 32A of the Income Tax Act is unassailable. The Tribunal, after referring to the rival pleas advanced before it by counsel for the assessee as well as by the Revenue and on the basis of the various materials placed before it, observed thus :

"On a consideration of the various activities carried on by the assessee, viz., mixing of several materials in a particular preparation to make reinforced concrete for the construction of bridges and making of slabs from cement and various other intermediary materials which are processed to make them into concrete structures to support the tunnels and crushing big pieces of stones to obtain boulders of various forms and sizes for being used in the construction of tunnels and projects, we are fully convinced that the entire activity of the assessee is manufacturing and processing of various materials to be used in its construction activities."

It is seen that on basis of the materials before it, the Tribunal has entered a finding that the entire activity of the assessee is manufacturing and processing of various materials to be used in its construction activities and, therefore, the assessee is engaged mainly in the manufacture or processing of goods and as such an "industrial company". On the basis that the assessee is an industrial company, the Tribunal further found that since the machinery was used in an industrial undertaking in the business of construction, manufacture or production of articles or things, the assessee is entitled to investment allowance u/s 32A of the Act. The finding that the assessee is engaged mainly in the manufacture or processing of goods and is an industrial undertaking is not in challenge before us. Admittedly, the assessee is a construction company and for the purpose of the manufacturing activities performed by it, it used the machinery in its business of construction. Since the assessee-company is an industrial undertaking as found by the Tribunal, and the new machinery or plant was installed for the purpose of business of construction, manufacture or production of articles or things, the Tribunal was justified in holding that the assessee is entitled to investment allowance u/s 32A of the Act. It is not open to the Revenue to contend in these references that the assessee-company is not an industrial undertaking, since the finding of fact in that regard entered by the Tribunal has not been expressly challenged by an appropriate question raised in the reference. - See *India Cements Ltd. Vs. Commissioner of Income Tax, Madras*, , *Commissioner of Income Tax, Bombay City I Vs. Greaves Cotton and Co. Ltd.*, , *Commissioner of Income Tax, West Bengal III Vs. Imperial Chemical Industries (India) (P.) Ltd.*, and *Aluminium Corporation of India Ltd. Vs. Commissioner of Income Tax, West Bengal*, . In the light of the finding of fact entered by the Tribunal, the conclusion arrived at by it to the effect that the assessee is entitled to investment allowance u/s 32A automatically follows. The only course open to us is to answer the question referred to this court in the affirmative, against the Revenue and in favour of the assessee.

Even on the merits, we are of the view that the reasons and conclusion of the Tribunal are justified in law. Section 32A(2)(b)(iii) of the Income Tax Act, 1961, runs as follows :

"32A. Investment allowance. - ... (2) The ship or aircraft or machinery or plant referred to in sub-section (1) shall be the following namely :- ...

(b) any new machinery or plant installed after the 31st day of March, 1976, ...

(iii) in any other industrial undertaking for the purposes of business of construction, manufacture or production of any article or thing not being an article or thing specified in the list in the Eleventh Schedule."

What is meant by the words "industrial undertaking" fall for consideration. The Income Tax Act does not define what is an "industrial undertaking". The said words occur in other provisions of the Act as well; for example, sections 54D, 80HH, 80HHA, 80I, 80J, etc. In the absence of a definition in the Act, the words "industrial undertaking" should be construed in its popular sense. Construing the words "industrial undertaking" occurring in section 54D of the Income Tax Act, a Bench of this court in *P. Alikunju, M.A. Nazeer Cashew Industries Vs. Commissioner of Income Tax*, stated thus :

"What then is an industrial undertaking. The Income Tax Act does not define what is an undertaking or what is an industrial undertaking. It has, therefore, become necessary to construe these words. Words used in a statute dealing with matters relating to the general public are presumed to have been used in their popular rather than their narrow, legal or technical sense. *Loquitur ut vulgus*, that is, according to the common understanding and acceptation of the terms, is the doctrine that should be applied in construing the words used in statutes dealing with matters relating to the public in general. In short, if an Act is directed to dealings with matters affecting everybody generally, the words used have the meaning attached to them in the common and ordinary use of language. (*Vide Unwin v. Hanson* [1891] 2 Q.B. 115 (CA), per Lord Esher M. R., at page 119). That the Income Tax Act is of general application, is beyond dispute. It, therefore, follows that the meaning that should be given to these words industrial undertaking must be the natural meaning. It is all the more so because the Income Tax Act is one consolidating and amending the law relating to Income Tax and supertax. (*See Ravula Subba Rao and Another Vs. The Commissioner of Income Tax, Madras*,).

Undertaking in common parlance means an enterprise, venture, engagement. It can as well mean the act of one who undertakes or engages in a project or business (Webster). An undertaking mentioned in section 54D must be one maintained by a person for the purpose of carrying on his business. Undertaking, for the purpose of this section, however, must be an industrial undertaking. The demonstrative adjective industrial qualifying the word undertaking unmistakably and with precision shows that the undertaking must be one which partakes of the character of a business."

In *Chaturvedi and Pithisarias Income Tax Law*, Third Edn., at page 2156, the authors have stated what is meant by "industrial undertaking".

"The expression industrial undertaking in section 80J must be interpreted to mean any venture or enterprise which a person undertakes to do and which has relation to some industry or has relation to some industry or has some industrial

consequences. The notion of an undertaking basically means that it has got to be a concrete and tangible venture in the path of industry to make it an industrial undertaking, wherein some capital is employed, and which is separate to the extent as to show how much a 6% (or 7.5%, as the case may be), return would amount so as to make it allowable."

In an unreported decision in I. T. R. C. Nos. 138, 139, 217 and 218 of 1985 and 27 of 1986 - since reported in *Shankar Construction Co. Vs. Commissioner of Income Tax*, - a Bench of the Karnataka High Court was concerned with a similar question where the assessee-firm was carrying on business in manufacturing and sale of tiles and construction work on a somewhat large scale, specialising in construction of dams and canals, and the question arose as to whether they were entitled to investment allowance on the plant and machinery employed in execution of their construction work on the site of the construction, which was disallowed by the assessing authority and upheld by the Income Tax Appellate Tribunal. The court was invited to construe the word "industrial undertaking" occurring in section 32A(2)(b)(iii) of the Income Tax Act. The court referred to the decision of the Orissa High Court in *Commissioner of Income Tax Vs. N.C. Budharaja and Company*, , the earlier decision of the Mysore High Court in *Sree Yallamma Cotton Woollen and Silk Mills Co. Ltd.s case* [1970] 40 Comp Cas 466; AIR 1969 Mys 280 and of the Madras Court in *Commissioner of Income Tax, Madras Vs. M.R. Gopal*, , the decision of the Delhi High Court in *National Projects Construction Corporation Ltd. Vs. Commissioner of Wealth Tax*, and the meaning of the word "industrial undertaking" as given in *Strouds Judicial Dictionary*, Vol. 3, Fourth Edn., at page 1357, and held that the activities carried on by the assessee in those cases were certainly those of an "industrial undertaking". The said judgment is dated November 8, 1990. The word "industrial undertaking" has come up for very elaborate consideration before the Supreme Court in *Bangalore Water Supply and Sewerage Board Vs. A. Rajappa and Others*, . The word has been construed in a very wide or liberal sense. We are of the view that the word "industrial undertaking" occurring in section 32A(2)(b)(iii) of the Income Tax Act should be construed in a liberal, wide and practical sense. The statutory language is clear and we should not import any limitation therein. It cannot be stated that in all cases, manufacture or production is a condition precedent to all an activity, business, or trade an "industrial undertatking". We should bear in mind the wide language employed in section 32A(2)(b)(iii) of the Income Tax Act. The "industrial undertaking" may be any one of the categories, "business of construction", "business of manufacture", "business of production", of any article or thing, not specified in the Eleventh Schedule. It cannot be denied that the assessee is carrying on the business of "construction" - an integrated and complicated business -in a systematic manner. While engaged in the business of construction, it is manufacturing and processing various materials to be used in the construction. It is using the plant or machinery in such feeding or ancillary activities to carry on the business of construction more efficiently and economically. The feeding activity so carried on for "manufacturing or processing

of goods" facilitates efficient and economic management and the effectuation of the purpose of construction. On a plain reading of section 32A(2)(b)(iii), of the Act, we are satisfied that the assessee used the new machinery or plant in an "industrial undertaking" for the purpose of construction, manufacture or production of an article or thing and such article or thing is not one specified in the list in the Eleventh Schedule and so the assessee is entitled to the relief u/s 32A of the Act.

In this context, we may usefully quote the following observations of the editors of Kanga and Palkhivalas "The Law and Practice of income tax", Eighth Edn., Vol. I, page 965 :

"In those cases where the context of the section, e.g., section 32A or section 33, merely refers to plant or machinery used for a business activity or manufacturing or processing goods, even the contractor and the hotelkeeper would be entitled to the benefit in respect of assets used for their ancillary manufacturing or processing activities, e.g., a hotelkeepers activity of preparing food. A company engaged in the construction of dams and barrages may itself manufacture the products which are required to be utilised in the construction work."

In footnote 24, the learned authors have particularly referred to two decisions - National Projects Construction Corporation Ltd. Vs. Commissioner of Wealth Tax, and Commissioner of Income Tax Vs. N.C. Budharaja and Company, . In Commissioner of Income Tax Vs. N.C. Budharaja and Company, the term "industrial undertaking" occurring in section 80HH of the Income Tax Act came up for consideration. Delivering the judgment of the Bench, R. N. Misra J., at pages 217 and 218 stated thus :

"Industrial undertaking has no statutory definition. The law is fairly settled that where is an absence of the statutory definition, it would be open to look for the meaning by referring to the definitions in sister legislations and failing that, to adopt the common parlance meaning. There can be no dispute that the business of a contractor who has undertaken the construction of an irrigation project would be an industrial undertaking for the purpose of the Industrial Disputes Act. The concept of industrial undertaking need not necessarily be confined to manufacture and production of articles. Even in the absence of either of them, in the strict sense, there could be an industrial undertaking. The Tribunal in the instant case has clearly recorded a finding of fact that the assessee had undertaken manufacture of certain materials which it ultimately utilised in the construction of the dam and it worked for the ultimate production of a dam."

The court came to the conclusion that the construction of a dam itself was a manufacturing process.

In the light of the above discussion, we are of the view that, on the merits also, the assessee is entitled to succeed. The finding of the Tribunal that the assessee is entitled to investment allowance u/s 32A of the Income Tax Act is justified in law.

We answer the question referred to this court on favour of the assessee and against the Revenue.

A copy of this judgment under the seal of this court and the signature of the Registrar will be forwarded to the Income Tax Appellate Tribunal, Cochin Bench.