

(1987) 01 KL CK 0015

In the High Court Of Kerala

Case No : Income Tax R. No's. 26 to 28 of 1981

Commissioner of Income Tax

APPELLANT

Vs

Cochin Refineries Limited

RESPONDENT

Date of Decision : 21-01-1987

Acts Referred:

Income Tax Act, 1961 — Section 254, 33, 34, 37, 43A

Citation : (1988) 70 CTR 167 : (1988) 173 ITR 461

Hon'ble Judges : T. Kochu Thommen, J; K.P. Radhakrishna Menon, J

Bench : Division Bench

Advocate : P.K.R. Menon, for the Appellant; K.A. Nayar, for the Respondent

Judgement

This Judgment has been overruled by : Commissioner of Income Tax, Gujarat Vs. Arvind Mills Ltd., AIR 1992 SC 718 : (1992) 101 CTR 91 : (1992) 193 ITR 255 : (1991) 5 JT 341 : (1991) 2 SCALE 1320 : (1992) 2 SCC 190 Supp : (1991) 3 SCR 303 Supp : (1992) 60 TAXMAN 192

T. Kochu Thommen, J.—This court, at the instance of the Revenue, directed the Income Tax Appellate Tribunal, Cochin Bench, to refer seven questions of law. The questions referred to us by the Tribunal are :

" 1. Whether, on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was justified in holding that purchase of dollars by the assessee-company for repayment of loans taken in dollars is in the ordinary course of the company's business, and if in making such purchase, the company incurs certain extra expenses because of the higher rate of foreign exchange, the company's claim for deduction of such expenses is allowable ?

2. Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was right in law in allowing the assessee's claim for deduction of a sum of Rs. 90,106 representing the difference in exchange for payment of dollar loans ?

3. Whether, on the facts and in the circumstances of the case, the Appellate Tribunal is justified in law in holding that the assessee-company's waste ponds, fresh water tank, pipe racks, alloy piping, jetty facilities, cherry picker cranes, etc., form an integral part of the refinery and, hence the company is entitled to higher rate of depreciation and development rebate in respect of them ?

4. Whether, on the facts and in the circumstances of the case, the Appellate Tribunal is right in law in holding that the Appellate Assistant Commissioner was justified in treating the miscellaneous expenses of the company as capital and adding the same to the cost of machinery for the purpose of depreciation and development rebate ?

5. Whether, on the facts and in the circumstances of the case, the Appellate Tribunal is right in law in holding that the company's claim to expenses other than expenses incurred for technical services should be allowed ?

6. Whether, on the facts and in the circumstances of the case, the Appellate Tribunal is right in law in holding that the company is entitled to claim development rebate and depreciation on the expenses incurred as per the technical services agreement ?

7. Whether, on the facts and in the circumstances of the case and on the interpretation of Section 43A of the Income Tax Act, 1961, the Appellate Tribunal was right in law in holding that the expenditure incurred by the company towards payment of interest, loan commitment fees, note issue expenses and certain miscellaneous expenses should also be considered u/s 43A of the Act, for the purpose of depreciation and development rebate ? "

2. The assessee is a Government-owned company carrying on the business of refining crude oil. The assessment year in question is 1968-69 relevant to the accounting year ending August 31, 1967. The assessee Submitted a nil return. The Income Tax Officer completed the assessment by determining the income at Rs. 94.39 lakhs and finding that the assessee was entitled to development rebate of more than Rs. 5 crores, the Officer adjusted the income against the said development rebate and unabsorbed development rebate of Rs. 4.92 crores. The assessee appealed against that order. The Income Tax Officer, in the meantime, reopened the assessment u/s 147(b) of the Income Tax Act, 1961, on the ground that the assessee had been granted excess depreciation allowance. In the reassessment order dated March 11, 1974, the Officer deducted the excess depreciation and development rebate. On March 18, 1974, the Appellate Assistant Commissioner disposed of the assessee's appeal against the original order of assessment by granting certain reliefs. Both the assessee and the Revenue appealed against that order before the Tribunal. In the meantime, the Appellate Assistant Commissioner, disposing of the appeal against the reassessment order, granted certain reliefs and rejected some of the reliefs sought. The assessee alone challenged that order before the Tribunal. Thus, there were three appeals before the Tribunal and all of them were disposed of by

it by a common order from which the questions referred to us arise.

3. We shall now deal with the questions seriatim. The Indian rupee was devalued on June 6, 1966. On that day, large loans which had been raised by the assessee in the United States of America remained unpaid. As a result of the devaluation, excess amounts became payable by the assessee to repay the loans. The loans were raised for the purchase of machinery and various other articles constituting the plant which was being set up by the assessee. As a result of devaluation, a sum of Rs. 4,67,41,206 became payable by the assessee in excess of what would have been otherwise payable. Forming part of this amount was Rs. 18,20,528 representing the value payable towards purchase of spare parts, catalysts, etc. The assessee claimed that the said sum of Rs. 18,20,528 represented revenue expenditure and was allowable as such. The Income Tax Officer rejected the contention that it was revenue expenditure. This finding was challenged by the assessee before the Appellate Assistant Commissioner, but the assessee restricted its claim for deduction to Rs. 7,31,689. The Appellate Assistant Commissioner disallowed the deduction. On further appeal by the assessee, the Tribunal held that the sum of Rs. 7,31,689 represented revenue expenditure, but allowed deduction only to the extent of Rs. 1,56,977 being, what in the opinion of the Tribunal was, the portion relevant to the assessment year in question.

4. The assessee also claimed a sum of Rs. 90,106 as revenue expenditure, being the foreign exchange difference caused by fluctuation in currency rates. This amount represented excess payment which the assessee had to make for repayment of loans raised for the purchase of capital assets. Both the Income Tax Officer and the Appellate Assistant Commissioner disallowed the assessee's claim. The Tribunal, however, held that the said sum was admissible as revenue expenditure.

5. It is not in doubt that the loans were raised for the purchase of machinery, spare parts and other articles forming part of the plant which was being set up by the assessee. The loan was thus utilised for acquisition of capital assets and its repayment was, therefore, a capital expenditure. We are accordingly of the view that what was paid or what had become payable by the assessee in excess of the original rates, owing to devaluation or fluctuation in the value of currency, was payment for the acquisition of capital assets and was, therefore, capital expenditure. In an identical situation, a similar view was expressed by the Calcutta High Court in *Union Carbide India Ltd. Vs. Commissioner of Income Tax*, and *Bestobell (India) Ltd. Vs. Commissioner of Income Tax*, . With respect we adopt that view. Accordingly, we answer questions Nos. 1 and 2 in the negative, that is, in favour of the Revenue and against the assessee.

6. The assessee had claimed depreciation and development rebate at the higher rate on certain assets such as waste ponds, fresh water tank, pipe racks, alloy piping, jetty facilities, cherry picker cranes, etc. The assessee claimed depreciation and development rebate on these items at the higher rate applicable to the refinery plant. The Income Tax Officer, however, allowed depreciation and

development rebate only at the lower rate applicable to each of the assets, depending upon whether it represented building, machinery, etc. The Appellate Assistant Commissioner, on appeal, allowed depreciation and development rebate at the higher rate in respect of certain items, but allowed only lower rates in respect of other items. On further appeal by the assessee, the Tribunal allowed the higher rate of depreciation and development rebate for all the items. In our view, the Tribunal was right in doing so, for, by the very nature of the assets in question, we have no doubt that they form part of the refinery plant and are as such entitled to these allowances at the higher rate. Accordingly, we answer question No. 3 in the affirmative, that is, in favour of the assessee and against the Revenue.

7. The assessee claimed deduction as revenue expenditure in respect of certain items of miscellaneous expenses. The Income Tax Officer disallowed the claim and treated it as capital expenditure. However, he further held that such expenditure was not entitled to depreciation and development rebate. On appeal by the assessee, the Appellate Assistant Commissioner held that the assets in question were entitled to depreciation allowance. This finding was not challenged by the assessee. The Revenue, however, challenged the finding of the Appellate Assistant Commissioner because depreciation was allowed by him in respect of these assets. The Tribunal noticed that the assessee did not file an appeal on the ground that of the two allowances claimed, what was allowed was only depreciation. The Tribunal further noticed that the finding of the Appellate Assistant Commissioner granting depreciation allowance was challenged by the Revenue. The Tribunal, following the principle stated by the Supreme Court in *Challapalli Sugar Ltd. Vs. The Commissioner of Income Tax, A.P., Hyderabad*, , allowed depreciation as well as development rebate in respect of these miscellaneous items of expenditure.

8. It is, in our view, rightly contended on behalf of the Revenue that the Tribunal went wrong in granting a relief which was not sought by the assessee. The assessee did not challenge the finding of the Appellate Assistant Commissioner that it was entitled only to depreciation allowance. Counsel for the assessee, however, Submits that although not specifically and expressly allowed, the development rebate was not disallowed. We do not agree. While the Income Tax Officer refused to grant either depreciation or development rebate, the Appellate Assistant Commissioner, on appeal by the assessee claiming both the allowances, specifically granted only depreciation, thereby rejecting the claim for development rebate. If the assessee was aggrieved by that finding, it ought to have challenged it. The assessee did not do so. Therefore, that was a relief which was not sought by the assessee before the Tribunal, and the Tribunal had no jurisdiction to grant what was not sought, although, in the light of the aforesaid decision of the Supreme Court, it would have been allowable had it been sought. The Appellate Assistant Commissioner's order on the point, in so far as it was not specifically challenged, became final and the assessee is bound by that finding. In the circumstances, we are of the view that the Tribunal exceeded its

jurisdiction and misdirected itself in finding that the assessee was entitled to development rebate. Accordingly, we redraft question No. 4 as follows :

" Whether, on the facts and circumstances of the case, the Tribunal was justified in allowing development rebate, notwithstanding that such rebate was disallowed by the order of the Appellate Assistant Commissioner and that order was not challenged by the assessee ? "

9. We answer the question, so recast, in the negative, that is, in favour of the Revenue and against the assessee.

10. In the order of assessment, the Income Tax Officer had allowed 90% of the pre-commissioning expenses claimed by the assessee to be capitalised as part of the assets. This assessment was reopened and the Officer disallowed a sum of Rs. 2,04,11,840. On appeal by the assessee, the Appellate Assistant Commissioner allowed capitalisation to the extent of Rs. 1,65,96,970 and disallowed the remainder. The Tribunal, however, on further appeal by the assessee, allowed capitalisation of the total amount and directed that depreciation and development rebate be allowed. In the light of the decision of the Supreme Court in *Challapalli Sugar Ltd. Vs. The Commissioner of Income Tax, A.P., Hyderabad*, and of this court in *Commissioner of Income Tax Vs. Travancore-Cochin Chemicals Ltd.*, , we hold that the Tribunal was justified in allowing capitalisation of the total sum. Accordingly, we answer question No. 5 in the affirmative, that is, in favour of the assessee and against the Revenue.

11. Forming part of the aforesaid amount of Rs. 2,04,11,840, there was a sum of Rs. 35,05,963 in respect of which the assessee claimed depreciation and development rebate, being expenses incurred in terms of Technical Services Agreement (T.S.A.). The contention of the Revenue has been that in so far as no tangible asset was obtained by the expenditure concerned, such expenditure did not attract depreciation or development rebate. This contention of the Revenue was, in our view, rightly rejected by the Tribunal in the light of the decision of the Supreme Court in *Scientific Engineering House (P) Ltd. Vs. Commissioner of Income Tax, Andhra Pradesh*, . The Supreme Court stated (headnote):

"The capital asset acquired by the appellant, viz., the technical know-how in the shape of drawings, designs, charts, plans, processing data and other literature, fell within the definition of "plant" and was, therefore, a depreciable asset. "

12. The facts relating to the present claim being identical to the facts stated by the Supreme Court, we are of the view that the principle stated by the Supreme Court is squarely applicable in so far as this claim is concerned. However, counsel for the Revenue Submits that the Supreme Court in *Sitalpur Sugar Works Ltd. Vs. Commissioner of Income Tax, Bihar and Orissa*, had disallowed the claim for depreciation in respect of dismantling and shifting expenditure on the ground that no tangible asset had been acquired by such activity which could be said to have depreciated. The present case is not, however, a case of dismantling or shifting, but of construction of a plant which is undoubtedly of an enduring

character. Depreciation and development rebate were, in our view, rightly granted in respect of such expenditure. In the circumstances, question No. 6 is answered in the affirmative, that is, in favour of the assessee and against the Revenue.

13. We have already answered questions Nos. 1 and 2 to the effect that the amounts in question represented capital expenditure necessitated by reason of devaluation and currency fluctuation. For the same reason, we must necessarily hold that the sum of Rs. 15,13,004, being excess liability towards payment of interest on dollar loans, etc., obtained for the acquisition of capital assets, is attracted by Section 43A of the Income Tax Act, 1961. Accordingly, we answer question No. 7 in the affirmative, that is, in favour of the assessee and against the Revenue.

14. We direct the parties to bear their respective costs in these tax referred cases.

15. A copy of this judgment under the seal of the High Court and the signature of the Registrar shall be forwarded to the Income Tax Appellate Tribunal, Cochin Bench.