(1999) 09 KL CK 0066

In the High Court Of Kerala

Case No : IT Ref. No. 109 of 1996 23rd September, 1999

COMMISSIONER OF INCOME TAX — APPELLANT

Vs

COCIUN REFINERIES LTD. — RESPONDENT

Date of Decision : 23-09-1999

Acts Referred:
Income Tax Act, 1961 — Section 256, 35, 41, 43

Citation : (2000) 158 CTR 293

Hon'ble Judges : Arijit Pasayat, C.J;K.S. Radhakrishnan, J

Bench : Full Bench

Judgement

ARMIT PASA YA T, C. J.

Revenue has questioned correctness of the decision rendered by the Appellate Tribunal, Cochin Bench (in short ''the Tribunal'') on two questions. Pursuant to the direction given by this Court by order dt. 1st March, 1996, the following questions by this Court by order dt. 1st March, 1996, the following questions have been referred for the opinion of this Court u/s 256(2) of the Income Tax Act, 1961 (in short ''the Act'') :

"1. Whether, on the facts and in the circumstances of the case, the assessee is entitled to investment allowance on the computer installed ?

2. Whether, on the facts and in the circumstances of the case, the Tribunal is right in law and fact :

(i) in holding that ''the provisions of s. 41(2) of the Income Tax Act are not attracted to the facts of the case ? (ii) in setting aside the order of the Commissioner (Appeals) on the above issue

2. Factual position which is undisputed is as follows : Assessee is a public limited company. It is engaged in the business of refining crude oil. It claimed investment allowance on the computer installed by it for the assessment year 1984 85. There was a fire in its business premises on 8th March, 1984 and

substantial damage was caused to the assets. It has received total payment of Rs. 13.28 crores on various dates from the insurance company. Out of the above sum, the assessing officer brought to tax a sum of Rs. 32,92,692 as taxable profit by application of s. 41(2) of the Act. So far as the claim of investment allowance on the computer is concerned, the same was disallowed on the ground that it was not (sic) an office appliance. The views of the assessing officer were affirmed on both counts by the Commissioner (Appeals) (in short "the Commissioner (Appeals)). On Second Appeal, the Tribunal accepted assessee''s stand regarding grant of investment allowance on the computer as well as non-taxability u/s 41(2) of the Act. Application filed by the Revenue for reference u/s 256(1) was rejected. Pursuant to the direction given by this Court, the Tribunal referred the above quoted questions to this Court for opinion u/s 256(2) of the Act.

3. So far as the first question is concerned, the same is covered by a decision of this Court in Commissioner of Income Tax Vs. Computerised Accounting and Management Service Pvt. Ltd., . We are in agreement with the view expressed in that case. Accordingly, the question is answered in the affirmative, in favour of the assessee and against the Revenue.

4. So far as the second question is concerned, the learned counsel for the Revenue submitted that the scope and ambit of s. 41(2) of the Act has been lost sight of by the Tribunal. Accordingly to him, the money received by the assessee after adjustment of written down value of the assets destroyed has to be brought to tax. Learned counsel for the assessee, on the other hand, submitted that, in fact, no money was received and the insurance company who had insured the assets replaced the assets. That being the position, s. 41(2) of the Act has no application.

5. In order to appreciate the rival submissions, a reference to s. 41(2) of the Act is necessary. The said provision as it stood at the relevant point of time reads as follows :

"41(2) Where any building, machinery, plant or furniture which is owned by the assessee and which was or has been used for the purposes of business or profession is sold, discarded, demolished or destroyed and the moneys payable in respect of such building, machinery, plant or furniture as the case may be, together with the amount of scrap value, if any, exceed the written down value, so much of the excess as does not exceed the difference between the actual cost and the written down value shall be chargeable to Income Tax as income of the business or profession of the previous year in which the moneys payable for the building, machinery, plant or furniture became due :

Provided that where the building sold, discarded, demolished or destroyed is a building to which ExpIn. 5 to s. 43 applies, and the moneys payable in respect of such building, together with the amount of scrap value, if any, exceed the actual cost as determined under that Explanation, so much of the excess as does not exceed the difference between the actual cost so determined and the written down value shall be chargeable to Income Tax as income of the business or profession of such previous year:

Provided further that where an asset representing expenditure of a capital nature on scientific research within the meaning of cl. (c) of sub-section (213) of s. 35, r/w cl. (4) of s. 43 owned by the assessee which was or has been used for the purposes of business after it ceased to be used for the purpose of scientific research related to the business is sold, discarded, demolished or destroyed, the provisions of thio, sub-section shall apply as if for the words "actual cost", at the first place where they occur, the words "actual cost as increased by twenty-five per cent, thereof, had been substituted.

Explanation-Where the moneys payable in respect of the building, machinery, plant or furniture referred to in this sub-section become due in a previous year in which the business or profession for the purpose of which the building, machinery, plant or furniture was being used is no longer in existence, the provisions of this sub-section shall apply as if the business or profession is in existence in that previous year."

6. For determination of the question, agreement of insurance company with the assessee needs to be noted. The relevant portion of the same reads as follows -

"The company agrees (subject to the conditions contained herein or endorsed or otherwise expressed hereon which conditions shall so far as the nature of them respectively will permit be deemed to be conditions precedent to the right of the insured to recover hereunder) that if after payment of the premium the property insured described in the said Schedule, or any part of such property, be destroyed or damaged by :

(1) Fire (including fire resulting from explosion - (2) Lightening ., (3) explosion of boiler used for domestic purposes only ; (4) explosion of gas used for domestic purposes only or for lighting or heating in a building forming part of any gas works, at any time before 4 0'' clock in the afternoon of the last day of the period of insurance named in the said schedule or of any subsequent period in respect of which the insured shall have paid and the company shall have accepted the premium required for the renewal of the policy, the company will pay to the insured the value of the property at the time of the happening of its destruction or the amount of such damage or at its option reinstate or replace such property or any part thereof :

Provided that the liability of the company shall in no case exceed in respect of each item the sum expressed in the said scheme to be insured thereon or in the whole the total sum insured hereby, or such other sum or sums as may be substituted therefor, by memorandum hereon or attached hereto signed by or on behalf of the company."

This portion has been extracted by the Tribunal with reference to the Policy No.

42310/0/0/F/5003.

7. A communication was received from the insurance company on 4th June, 1984 and the same reads as follows ..

"Ref. Fire Accident on 8th March, 1984

Ref. : Policy No. 42310/0/0/F/5003 & MSE No. 4510/0/0/OPL/M 3301 & 51, 4510/0/0/OPL/M/5147 (MSE)

We refer to the various discussions the undersigned had with you in regard to the settlement of the insurance claim in respect of the buildings, machinery and other assets destroyed/damaged by fire on 8th March, 1984. The extent of the damage and destruction is being assessed by our surveyors.

As already discussed with you, we are agreeable to repair, restore and reinstate the assets destroyed by fire to their original position by rebuilding or repairing the assets. We hereby entrust you to carry out the repairs, restoration and reinstatement of the damaged/destroyed facilities on our behalf.

Kindly return to us the duplicate copy of this letter having accepted the terms and conditions."

8. It is evident from a bare reading of the relevant portion of the terms and conditions of the policy, and the letter of the insurance company that it had undertaken to repair, restore and reinstate the assets destroyed by fire to its original position by rebuilding or repairing the assets. The undisputed factual position is that insurance company had requested assessee to undertake the work and had entrusted the work to the assessee itself for rebuilding and/or repairing the assets on its behalf. By exercising the option to replace the damaged assets, the insurer discharged his liability under the terms of the policy to make good the loss sustained, in specie, and in such a case there is no question of payment of money at all as the liability of the insurer to make the payment to cover the loss sustained by the insured would cease on the exercise of the option rendering the contract one for reinstatement ab initio which would mean that the contract between the insurer and the insured would be deemed in law to have always been from the inception one for reinstatement only and not for payment of money. Consequently, there was no question of payment of money by the insurance company and hence the provisions of s. 41(2) were not attracted. Similar view was expressed by the Madras High Court in Kasturi and Sons Ltd. Vs. Commissioner of Income Tax, and E.I.D. Parry Ltd. Vs. Commissioner of Income Tax, .

9. The second question is accordingly answered in the affirmative, in favour of the assessee and against the Revenue.

The reference is disposed of accordingly.

