(2001) 06 CAL CK 0015

In the Calcutta High Court

Case No : Income-tax Reference No. 100 of 1993

Commissioner of Income Tax — APPELLANT

Vs

Goodricke Group Ltd. — RESPONDENT

Date of Decision : 21-06-2001

Acts Referred:
Income Tax Act, 1961 — Section 35B, 35B(1)

Citation : (2001) 170 CTR 189 : (2001) 251 ITR 187 : (2001) 119 TAXMAN 979

Hon'ble Judges : Y.R. Meena, J;Malay Kumar Basu, J

Bench : Division Bench

Advocate : Sumit Chakraborty and Sunil Mukherjee, for the Appellant;R.N. Bajoria J.P. Khaitan and R.L. Mitra, for the Respondent

Judgement

1. The Tribunal has referred the following questions set out at page 2 of the paper book, for our opinion :

"1. Whether, on the facts and in the circumstances of the case, the finding of the Tribunal that the expenditure of Rs. 3,63,977 incurred as commission on the UK selling agent was for the purpose of maintenance of an agency for the promotion of sales outside India only is based on any relevant evidence or perverse ?

2. Whether, on the facts and in the circumstances of the case, the Tribunal was justified in law in allowing weighted deduction u/s 35B(1)(b)(iv) on the commission of Rs. 3,63,977 paid to the UK export agency ?"

2. The assessee is Goodricke Group Ltd. The assessment year is 1980-81. The. assessee is a resident-company, deriving income from sale of tea manufactured out of leaves grown in its own garden. During the assessment year, the assessee has claimed weighted deduction u/s 35B of the Act, on export markets development allowance which includes the commission paid to the UK selling agent for the purpose of maintenance of an agency for the promotion of sales outside India. The claim of the assessee was rejected by the Income Tax Officer.

3. In appeal before the Commissioner of Income Tax (Appeals), the

Commissioner of Income Tax (Appeals) has confirmed the view taken by the Income Tax Officer. In the second appeal before the Tribunal, the Tribunal has allowed the claim of the assessee u/s 35B(1)(b)(iv) of the Act of 1961.

4. At the outset learned counsel for the assessee, Mr. Bajoria, submits that the issue regarding allowance of weighted deduction on commission payment is concluded by the decision of the Supreme Court in Aravinda Paramila Works Vs. Commissioner of Income Tax, , and issues decided against the assessee. However, he submits that as the assessee has claimed weighted deduction on payment of commission not only u/s 35B(1)(b)(iv), but also on the other sub-clauses, i.e., Section 35B(1)(b)(ii) and (viii), if it is not allowable under Sub-clause (iv), the Tribunal should consider whether weighted deduction can be allowed in the other sub-clauses such as Sub-clause (ii) and Sub-clause (viii) of Clause (b) of Sub-section (1) of Section 35B. He drew our attention to page 32 of the paper book showing part of the judgment of the Commissioner of Income Tax (Appeals) which reveals that the assessee has claimed weighted deduction on commission under Sub-clause (ii) and Sub-clauses (iv) and (viii) of Clause (b) of Sub-section (1) of Section 35B of the Act. Therefore, if the weighted deduction is not allowable under Sub-clause (iv) of Clause (b) of Sub-section (1) of Section 35B, then the matter may be remanded back to the Tribunal to consider the claim of the assessee under other Sub-clauses (ii) and (viii) of Clause (b) of Sub-section (1) of Section 35B of the Act.

5. Learned counsel for the Revenue supported the decision of the Tribunal.

6. As clearly admitted by Mr. Bajoria the issue is now covered by the decision of the Supreme Court in the case of Aravinda Paramila Works Vs. Commissioner of Income Tax, , wherein their Lordships held that mere payment of commission to an agent outside India is not enough and on that commission no weighted deduction can be allowed under Sub-clause (iv) of Clause (b) of Sub-section (1) of Section 35B.

7. Following their view, we answer both the questions that weighted deduction on payment of commission to the UK selling agent cannot be allowed under Sub-clause (iv) of Clause (b) of Sub-section (1) of Section 35B of the Act.

8. But in this case the weighted deduction has been claimed under various Sub-clauses of Clause (b) of Sub-section (1) of Section 35B and if the claim of the assessee was wrongly allowed by the Tribunal under Sub-clause (iv) of Clause (b) of Sub-section (1) of Section 35B, and if the claim is allowable under other sub-clauses, the matter can be remanded to the Tribunal. In similar cases, their Lordships have remanded the matter back to the Tribunal to consider whether the claim of the assessee comes under any of the sub-clauses of Clause (b) of Sub-section (1) of Section 35B of the Act. This view has been taken by the apex court in the case of Commissioner of Income Tax (CNTL), Ludhiana Vs. Hero Cycles Pvt. Ltd., Ludhiana, .

9. As we have seen from the order of the Commissioner of Income Tax

(Appeals), the assessee has claimed the weighted deduction on a commission paid to the U. K. selling agent, under Sub-clauses (ii), (iv) and (viii). When the commission is not allowable under Sub-clause (iv) of Clause (b) of Sub-section (1) of Section 35B, which has been allowed by the Tribunal, if the claim of the assessee for weighted deduction on payment of commission to the U. K. selling agent is allowable under Sub-clause (ii) or (viii) of Clause (b) of Sub-section (1) of Section 35B, that can be considered by the Tribunal. We remand the matter back to the Tribunal and the Tribunal is accordingly directed.

10. We further direct that the matter be decided within six months from the date of service of the signed copy of this order.

11. However, we also answer the questions referred in the negative, that is, in favour of the Revenue and against the assessee.

12. The reference so made stands disposed of accordingly.

13. All parties are to act on a signed xerox copy of this dictated order on the usual undertaking.