
(1996) 06 CAL CK 0042

In the Calcutta High Court

Case No : Income-tax Reference No. 6 of 1994

Commissioner of Income Tax

APPELLANT

Vs

Graphite India Ltd.

RESPONDENT

Date of Decision : 21-06-1996

Acts Referred:

Income Tax Act, 1961 — Section 35B, 35B(1), 37

Citation : (1997) 137 CTR 123 : (1996) 221 ITR 420

Hon'ble Judges : Visheshwar Nath Khare, C.J.; Vinod Kumar Gupta, J

Bench : Division Bench

Advocate : M.P. Agarwall and R.C. Prosad, for the Appellant; R.N. Bajoria and J.P. Khaitan, for the Respondent

Judgement

Visheshwar Nath Khare, C.J.—By this reference at the instance of the Revenue, the following questions have been referred by the Tribunal to this court u/s 256(2) of the Income Tax Act, 1961, for the assessment years 1981-82 and 1982-83 :

" 1. Whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that the assessee was entitled to weighted deduction on export sales commission paid to Great Lakes Carbon Corporation Ltd., U. S. A., u/s 35B(1)(b)(viii) of the Income Tax Act, 1961 ?

2. Whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that the amounts of Rs. 34,926 and Rs. 10,000 as well as Rs. 91,568 were allowable notwithstanding the provisions of Section 80VV of the Income Tax Act, 1961 ?

3. Whether, on the facts and in the circumstances of the case, the Tribunal was justified in deleting the addition of Rs. 1 lakh ?

Additional question in R. A. No. 436/(Cal) of 1992 for the assessment year 1982-83 :

4. Whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that the expenditure of Rs. 59,565 incurred for the assessee's proposed petro-chemical project was revenue expenditure and allowable as a deduction ?"

2. During the relevant assessment years, the Income Tax Officer took the view that the assessee was not entitled to weighted deduction u/s 35B of the Act in respect of the export sales commission paid to Great Lakes Carbon Corporation Ltd., U. S. A. The commission amounts were to the tune of Rs. 1,61,890 for the assessment year 1981-82 and Rs. 21,769 for the assessment year 1982-83. According to the Assessing Officer, the assessee was not eligible to weighted deduction in view of the deletion of Sub-clause (viii) of Section 35B(1)(b) with effect from April 1, 1981.

3. The assessee, however, claimed that in any event of the matter it was entitled to weighted deduction under Sub-clause (iv). This contention of the assessee was not accepted by the Income Tax Officer in respect of both the assessment years.

4. The Commissioner of Income Tax (Appeals) also upheld the order of the Assessing Officer. However, in the second appeal, the Tribunal upheld the claim of the assessee under Sub-clause (iv) of Section 35B(1)(b) of the Act. The Tribunal recorded a finding that Great Lakes Carbon Corporation Ltd., U. S. A., was the assessee's sole selling agent abroad. The payment of commission was found to be based on the agreement between the assessee and the U. S. A. company dated March 6, 1981, and under the terms of the agreement the assessee was liable to pay export expenses incurred in the sale of graphite products manufactured by the assessee. A commission of 25 per cent. of the net price was paid over and above the selling expenses and on this finding the Tribunal concluded that the export agency commission qualified for weighted deduction under Sub-clause (iv) of Section 35B(1)(b) of the Act.

5. It is in this background the questions have been referred to this court.

6. Learned counsel for the assessee urged that the first question stands concluded by two decisions of this court of which one is in the case of COMMISSIONER OF Income Tax Vs. CHLORIDE INDIA LTD., and the other is in the case of Commissioner of Income Tax Vs. Usha Telehoist Ltd., However, this has been disputed by learned counsel appearing for the Revenue. He relied on a decision of this court in the case of Commissioner of Income Tax Vs. Tribeni Tissues Ltd., .

7. In the case of COMMISSIONER OF Income Tax Vs. CHLORIDE INDIA LTD., , it was held by this court that the commission paid to an agent in a foreign country for promotion of export trade falls under Sub-clause (iv) of Clause (b) of Section 35B(1) of the Income Tax Act, 1961, and, as such, the commission is entitled to weighted deduction u/s 35B(1)(b)(iv) of the Act.

8. In the case of Commissioner of Income Tax Vs. Usha Telehoist Ltd., , it was held by this court that since the Legislature requires that an agency shall have to be maintained abroad, the requirement is sufficiently satisfied if there is an agent outside who promotes the sales of the assessee's exports and in that case the assessee was entitled to deduction u/s 35B(1)(b)(iv) of the Act on the commission paid to the foreign agents.

9. In the present case, the finding of the Tribunal is that the commission paid to the foreign agent was for the sales promotion and, as such, we are of the view that question No. 1 in this reference stands concluded by the aforesaid two decisions.

10. The decision relied upon by learned counsel for the Revenue is not fully applicable to question No. 1 and is of no assistance to his argument.

11. In the case of Commissioner of Income Tax Vs. Tribeni Tissues Ltd., , it was held that before any allowance is made under Sub-clause (iv) of Clause (b) of Section 35B(1) of the Income Tax Act, 1961, it is necessary to find out as to whether the maintenance of the agency outside India is for the promotion of sale outside India of the goods which the assessee deals in. The mere securing of information about the market conditions prevailing abroad cannot amount to sales promotion. In this case for ascertaining the purpose the case was remanded to the Tribunal and no proposition of law has been laid down as such. In the present case which is before us, since the expenditure, i.e., commission, was for sales promotion, we answer question No. 1 in the affirmative and in favour of the assessee and against the Revenue.

12. So far as question No. 2 is concerned, it is agreed between the parties that it stands concluded by the three decisions of this court in the case of Commissioner of Income Tax Vs. United Commercial Bank Ltd., ; in the case of Grindlays Bank Plc. Vs. Commissioner of Income Tax, and in the case of Commissioner of Income Tax Vs. Hayward Waldia Refinery Ltd., .

13. In the case of Commissioner of Income Tax Vs. United Commercial Bank Ltd., , it was held that the expenditure incurred in the preparation of the return and the travel expenses did not come within the purview of Section 80VV and only the amount that was incurred towards the fees of the Income Tax lawyer in connection with appearance before the appellate authorities or the Tribunal comes within the purview of Section 80W.

14. In the case of Grindlays Bank Plc. Vs. Commissioner of Income Tax, , this court was of the view that Section 80VV of the Act does not apply to expenditure on proceedings relating to reassessment. It was further held that the expenditure incurred in connection with any proceedings taken by the assessee challenging the steps taken by the Income Tax Officer for the computation of the liability of the assessee will clearly come within the mischief of Section 80VV.

15. In the case of Commissioner of Income Tax Vs. Hayward Waldia Refinery

Ltd., , it was held that the remuneration paid to the director for giving professional advice did not attract the provisions of Section 80VV read with Section 37(1) of the Act.

16. In view of the aforesaid decisions, we answer question No. 2 in this reference in the affirmative and in favour of the assessee and against the Revenue.

17. So far as question No. 3 in this reference is concerned, it is conceded by learned counsel appearing for the Revenue that this question is a pure question of fact and need not be answered by this court. In view of this statement made by learned counsel appearing for the Revenue, we do not propose to answer this question.

18. So far as question No. 4 is concerned, the Tribunal recorded the finding that the assessee spent an amount of Rs. 56,665 as project expenditure. The expenditure represented fees paid to Engineering India Ltd. in connection with the petro-chemical project report. The amount was paid by the assessee in order to explore the possibility of setting up of a petro-chemical project which could provide a captive plant for manufacture of raw material at the assessee's own factory which would help the assessee in getting continuous supply of raw material even during periods of acute shortage. In fact, the project did not materialise. The Income Tax Officer as well as the Commissioner of Income Tax (Appeals), therefore, held that the expenditure was capital in nature. However, the Tribunal found that the expenditure did not result in bringing into existence any capital asset of enduring in nature. The Tribunal further found that the decision of the Calcutta High Court in the case of Hindusthan Aluminium Corporation Ltd. Vs. Commissioner of Income Tax, was applicable and following that decision held that the expenditure was allowable as incurred wholly and exclusively for the purpose of the assessee's business. Therefore, the Tribunal deleted the disallowance. The case relied upon by the Tribunal was subsequently followed in the case of Asiatic Oxygen Ltd. Vs. Commissioner of Income Tax, . This court in the said case reiterated the view taken in Hindusthan Aluminium Corporation Ltd. Vs. Commissioner of Income Tax,

19. According to us, question No. 4 in this reference stands concluded by the aforementioned two decisions. We, accordingly, answer question No. 4 in the affirmative and in favour of the assessee and against the Revenue.

20. There will be no order as to costs.

21. Let the answers given by us to the questions referred to us be sent to the Income Tax Appellate Tribunal, "B" Bench, Calcutta.

Vinod Kumar Gupta, J.

22. I agree.