(2005) 01 AHC CK 0023

In the Allahabad High Court

Case No : IT Ref. No. 205 of 1988

Commissioner of Income Tax APPELLANT

Vs

J.C. Bhatia RESPONDENT

Date of Decision : 04-01-2005

Acts Referred:
Income Tax Act, 1961 — Section 256(1), 32A(2), 35B, 35B(1A), 80MM(2)

Citation : (2005) 198 CTR 384 : (2006) 287 ITR 356 : (2006) 153 TAXMAN 401

Hon'ble Judges : R.K. Agrawal, J;Prakash Krishna, J

Bench : Division Bench

Advocate : Shambhu Chopra, for the Appellant; R.S. Agrawal, for the Respondent

Judgement

1. The Tribunal, Delhi, has referred the following question of law for the asst. yr. 1979-80 u/s 256(1) of the IT Act, 1961 (hereinafter referred to as the Act), for opinion to this Court :

"Whether, on the facts and in the circumstances of the case, the assessee could be termed as an industrial undertaking entitled for the deduction u/s 35B of the IT Act, 1961 ?"

2. The facts giving rise to the present case are as follows :

The assessee-respondent is an exporter and he exported articles made of brass and claimed relief u/s 35B(1A) of the IT Act, 1961. He claimed himself a small-scale exporter. The ITO refused to accept the aforesaid claim of the assessee-respondent on the findings that the goods exported by the assessee were not produced in the small-scale undertaking owned by the assessee. The AAC on appeal reversed the findings and held that the goods exported by the assessee were manufactured or produced by the assessee in small-scale undertaking owned by the assessee. The said order has been confirmed in further appeal by the Tribunal.

3. Heard Shri Shambhu Chopra, the learned Counsel for the Department, and

Shri R.S. Agrawal, the learned Counsel for the assessee-respondent.

4. The learned standing counsel submitted that in view of Section 35B(1A) of the Act as it stood at the relevant time, it was essential for the assessee to own an industrial undertaking to be treated as small-scale exporter.

5. Sub-section (1A) of Section 35B along with Explanation is reproduced below :

''(1A) Notwithstanding anything contained in Sub-section (1), no deduction under this section shall be allowed in relation to any expenditure incurred after the 31st day of March, 1978, unless the following conditions are fulfilled, namely :

(a) the assessee referred to in that Sub-section is engaged in--

(i) the business of export of goods and is either a small-scale exporter or a holder of an export house certificate; or

(ii) the business of provision of technical know-how, or the rendering of services in connection with the provision of technical know-how, to persons outside India''; and

(b) the expenditure referred to in that Sub-section is incurred by the assessee wholly and exclusively for the purposes of the business referred to in Sub-clause (i) or, as the case may be, Sub-clause of clause (a)

Explanation : For the purposes of this Sub-section,--

(a) "small-scale exporter" means a person who exports goods manufactured or produced in any small-scale industrial undertaking or undertakings owned by him:

Provided that such person does not own any industrial undertaking which is not a small scale industrial undertaking;

(b) "Export House Certificate" means a valid Export House Certificate issued by the Chief Controller of Imports and Exports, Government of India;

(c) "provision of technical know-how" has the meaning assigned to it in sub-Section (2) of Section 80MM;

(d) "small-scale industrial undertaking" has the meaning assigned to it in Clause (2) of the Explanation below Sub-section (2) of Section 32A.''

Clause (2) of Explanation below Sub-section (2) of Section 32A reads as follows:

(2) an industrial undertaking shall be deemed to be a small scale industrial undertaking, if the aggregate value of the machinery and plant (other than tools, jigs, dies and moulds) installed, as on the last day of the previous year, for the purpose of the business of the undertaking does not exceed,-- ''

(i) in a case where the previous year ends before the 1st day of August, 1980--ten lakh rupees;

(ii) in a case where the previous year ends after the 31st day of July, 1980, but before the 18th day of March, 1985--twenty lakh rupees; and

(iii) in a case where the previous year ends after the 17th day of March, 1985--thirty-five lakh rupees, and for this purpose the value of any machinery or plant shall be,--

(a) in the case of any machinery or plant owned by the assessee, the actual cost thereof to the assessee; and

(b) in the case of any machinery or plant hired by the assessee, the actual cost thereof as in the case of the owner of such machinery or plant.

The Explanation to Section 35B(1A) provides that "small-scale exporter" means a person who exports goods manufactured or produced in any small-scale "industrial undertaking" or undertakings "owned by him". The phrase "owned by him" is very important so far as Section 35B of the Act is concerned.

6. We have interpreted the aforesaid Explanation and have held that to claim weighted deduction u/s 35B of the Act, the assessee should own the industrial undertaking to become "small-scale exporter" in IT Ref. No. 34 of 1986 Orient Arts and Crafts v. CIT decided on 1st of December, 2004.

7. We have carefully considered the orders of learned Asstt. CIT and that of the Tribunal, None of them had recorded a finding that the assessee-respondent owned any industrial undertaking. They have been swayed away by the consideration that the assessee is a manufacturer and gets the articles manufactured by the artisans and advances money for the purchase of brass to make the articles and sometimes the imported raw material is supplied by the assessee from his own stock. These considerations have hardly any relevance with the question as to whether the assessee is a small-scale exporter or not. None of these two authorities have considered the Explanation attached to Section 35B(1A) of the Act.

8. In view of the aforesaid discussion, we are of the opinion that in the absence of any finding that the assessee-respondent owned any industrial undertaking, the assessee-respondent cannot be termed as "small scale exporter" and, therefore, is not entitled for weighted deduction u/s 35B of the Act. Consequently, we answer the above question in the negative i.e., in favour of the Revenue and against the assessee. But no order as to costs.

