

(1994) 11 KL CK 0035

In the High Court Of Kerala

Case No : Income-tax Reference No's. 30 to 32 of 1991 and Original Petition No's. 17954, 17955 and 18001 of 1993

Commissioner of Income Tax

APPELLANT

Vs

Khaders International Constructions Ltd.

RESPONDENT

Date of Decision : 09-11-1994

Acts Referred:

Income Tax Act, 1961 — Section 32A, 32A(2)

Citation : (1995) 213 ITR 869

Hon'ble Judges : T.L. Viswanatha Iyer, J; D.J. Jagannadha Raju, J

Bench : Division Bench

Advocate : P.K.R. Menon and N.R.K. Nair, for the Appellant; C.M. Devan, Senior Advocate, for the Respondent

Judgement

T.L. Viswanatha Iyer, J.—The Income Tax Appellate Tribunal, Cochin Bench has referred the following question of law for the opinion of this court u/s 256(1) of the Income Tax Act, 1961 :

" Whether, on the facts and in the circumstances of the case, the assessee is entitled to investment allowance u/s 32A of the Income Tax Act, 1961 ?"

2. This reference was made in relation to three years 1981-82, 1982-83 and 1983-84 in respect of which the Revenue sought reference of three different questions in its application for reference, namely :--

"1. Whether, on the facts and in the circumstances of the case, the Tribunal was right in law and fact in finding that the assessee is entitled to investment allowance u/s 32A ?

2. Whether, on the facts and in the circumstances of the case, the Tribunal was right in law and fact in finding that the activity of the assessee would be well within the term "business" of construction in Section 32A(2)(b)(iii) ?

3. Whether, on the facts and in the circumstances of the case, the Tribunal was

right in law and fact in finding that the assessee is an "industrial company" ?"

3. But the Tribunal felt that it was necessary to refer only the question extracted by us earlier as had been referred in a similar case in the case of one Messrs. Bhageeratha Engineering Limited. Since the Revenue felt aggrieved that the questions sought by it in entirety had not been referred they filed the three applications, Original Petitions Nos. 17954, 17955 and 18001 of 1993 with petitions to condone the delay in filing them. We are satisfied that there are grounds to condone the said delay and we are accordingly condoning the delay.

4. The assessee is engaged in civil construction works like schools and hospital buildings in Libya. It claimed investment allowance in respect of the plant and machinery used in the construction works, u/s 32A of the Act. The assessing authority denied exemption holding that the provision did not apply to the machinery employed in civil construction works. He also held that the assessee was not an industrial undertaking. The Commissioner (Appeals) took a different view and allowed the investment allowance. On the Revenue's appeal, the Tribunal confirmed the allowance u/s 32A(2)(b)(iii) of the Act.

5. Section 32A allows deduction of what is termed investment allowance, inter alia, in respect of machinery or plant specified in Sub-section (2) which is owned by the assessee and is wholly used for the purposes of a business carried on by him. The allowance thus granted is in respect of the machinery or plant specified in Sub-section (2). As per Sub-clause (b)(iii) of Sub-section (2), the machinery or plant in respect of which the investment allowance is granted is such machinery or plant used by an industrial undertaking for the purposes of business of construction, manufacture or production of any article or thing, not being an article or thing specified in the list in the Eleventh Schedule. In order to earn the allowance, the machinery or plant should be used for the purpose of the business of construction, manufacture or production of any article or thing. As to what exactly is conveyed by "use in the construction of an article or thing" was the subject of consideration by the Supreme Court in a recent decision in Commissioner of Income Tax, Orissa and Others Vs. N.C. Budharaja and Company and Others, . The Supreme Court went into the question in depth as to the inter-relation of the words construction, article and thing. It was held that having regard to the scheme, the context and the legislative history of the provision, Sub-clause (b)(iii) of Sub-section (2) of Section 32A did not comprehend within its ambit the construction of a dam, a bridge, a building, a road, a canal or other similar constructions. It is in the light of this enunciation of the law by the Supreme Court that we have got to consider the case on hand.

6. While Sri P. K. Ravindranatha Menon, senior standing counsel for the Revenue, contends that the case squarely applies to the assessee's case, Sri C. M. Deyan is equally vehement that the said decision must be confined to its own facts, and that it must be limited to the construction of dams and irrigation canals and not others. We are unable to accept the contention of Sri C. M. Devan.

7. As we mentioned earlier, the Supreme Court was directly dealing with the question as to the meaning to be attributed to the word "construction" when it is interposed with the words "articles or things". There is an elaborate discussion on the question generally and not merely with reference to dams and irrigation canals, and it was ultimately held as mentioned by us earlier, that the section does not comprehend the various items mentioned therein, like dams, bridges, buildings, roads, canals and other similar constructions. It must be noted that in the course of discussion, the Supreme Court has mentioned that articles or things mentioned in the provision refer only to movable objects and that they cannot have any application to immovable items of the nature mentioned by us earlier, despite the use of the word "construction" therein. It has, therefore, to be held that Section 32A(2)(b)(iii) has no application to the construction of immovable items and that investment allowance is not available in respect of plant and machinery used for the construction of such items. Therefore, the case squarely falls within the ratio of the decision of the Supreme Court and the question referred to us has to be answered in favour of the Revenue and against the assessee.

8. Sri Devan had an alternate submission based on the last paragraph occurring in page 434 of the report that the Supreme Court did not deal with the question as to whether the assessee in that case was an industrial undertaking. According to C. M. Devan, that question has also to be tackled and if it is held that the assessee is an industrial undertaking the benefit of investment allowance should be accorded to him. We are unable to agree. What Sub-clause (b)(iii) of Sub-section (2) provides is that the plant or machinery which earns the benefit of the investment allowance is one which is used by an industrial undertaking for the construction, manufacture or production of any article or thing. Two conditions have to be satisfied under the sub-clause, that the user should be by an industrial undertaking and, secondly, that the user should be for the purposes mentioned. The conditions are cumulative and if either of these conditions is not satisfied investment allowance u/s 32A cannot be earned. So far as this case is concerned, the condition of user of the plant and machinery for the purpose of construction, manufacture or production of any article or thing is not satisfied and, therefore, the question whether the assessee is an industrial undertaking is immaterial and irrelevant. The fact that the latter condition is not satisfied is by itself sufficient to disentitle the assessee to the benefit of investment allowance under Sub-section (1) of Section 32A.

9. Since the answer to the question referred by the Tribunal is against the assessee, it has become unnecessary to deal with the three applications u/s 256(2) on the merits. We are not, therefore, expressing any opinion on the merits of those applications.

10. The question referred in Income Tax References Nos. 30 to 32 of 1991 is, therefore, answered against the assessee and in favour of the Revenue, that is, in the negative. The three original petitions filed u/s 256(2) of the Income Tax

Act, 1961, are dismissed as unnecessary.

11. Communicate a copy of this judgment under the seal of this court and the signature of the Registrar to the Income Tax Appellate Tribunal, Cochin Bench, for information.