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(1993) 02 AP CK 0041

In the Andhra Pradesh High Court

Case No : Revision Case No. 44 of 1984

Commissioner of Income Tax APPELLANT

Vs

Krishna Mohan Constructions RESPONDENT

Date of Decision : 02-02-1993

Acts Referred:
Income Tax Act, 1961 — Section 256(1), 32(4), 32A, 32A(1), 32A(2)

Citation : (1993) 02 AP CK 0041

Hon'ble Judges : Sundaram Nainar Sundaram, J;J. Eswara Prasad, J

Bench : Division Bench

Advocate : S.R. Ashok, for the Appellant;

Judgement

Sundaram Nainar Sundaram

1. Two questions have been referred at the instance of revenue for our opinion u/s 256(1) of the income tax Act, 1961 (''the Act). They are as under:

1. Whether, on the facts and in the circumstances of the case, the Appellate Tribunal is justified in holding that the contract work undertaken by the assessee. mainly of widening the existing roads and providing flexible overlays, is an ''industrial undertaking'' which is eligible for investment allowance u/s 32A?

2. Whether, on the facts and in the circumstances of the case, the Appellate Tribunal is justified in remitting back the issue to the income tax Officer directing him to examine the issue of investment allowance after verifying the facts whether the assessee has satisfied the conditions required u/s 34A(4) of the income tax Act, 1961?

In order to appreciate the nature of the controversy underlying these questions, it is necessary to note a few introductory facts. The respondent-assessee is a firm of contractors. For the assessment year 1980-81, it had taken up contract work mainly of widening the existing roads and providing flexible overlays. During the year, the assessee has claimed Investment allowance u/s 32A of the

Act amounting to Rs. 1,88,324, being one-fourth of the total cost of machinery of Rs. 7,53,299. The assessee stated to have purchased and having installed the new machinery after 31-3-1976 claimed this allowance in the accounting year relevant to the assessment year 1980-81. That was claimed u/s 32A(2)(b) on the basis that it was an industrial undertaking and was engaged in construction of roads. The ITO held that the nature of the work undertaken by the firm was widening of the roads and as such it could by no means make it an industrial undertaking, and further held that the assessee must be able to show that it was an industrial undertaking, being engaged in activities as specified in clauses (b)(ii) and (b)(iii) of sub-section (2) of section 32A and the assessee having not satisfied these conditions was not entitled to claim the investment allowance.

2. The assessee''s appeal before the Commissioner (Appeals) met the same fate. In its further appeal before the Tribunal, the assessee contended that making and widening of roads with machinery with process of mixture of number of items for the purpose of making and widening of existing roads, and spreading the material on the earth amounted to manufacture of an article or thing and that activity was of an industrial undertaking and, hence, the assessee was entitled to investment allowance u/s 32A. This contention of the assessee was accepted by the Tribunal which observed that even where the assessee was only widening roads, it would be constructing roads because the widened portion was, to that extent, in fact, a new road. So, after providing flexible overlays, the road was constructed because the road constructed was with a surface different from that which was the earlier surface. The Tribunal held that the assessee was engaged in the business of road construction and, thus, remitted back the issue to the ITO to consider whether the requirements u/s 32(4) were satisfied or not. The aforesaid decision of the Tribunal has given rise to the aforesaid two questions for our opinion.

3. At the time of final hearing of this reference, the learned standing counsel for the department vehemently contended that the Tribunal was in error in taking the view that the assessee was entitled to the benefit of section 32A. In his submission, the assessee could not be said to be an industrial undertaking and, secondly, even assuming that it was an industrial undertaking, it could not be said to be engaged in the manufacture or production of any article or thing within the contemplation of section 32A(2)(b)(ii) and (iii). It was, therefore, submitted that the first referred question be answered in favour of the revenue and against the assessee, and once it is so answered, the question No. 2 could not survive and has also to be answered in the negative in favour of the revenue. No one has appeared for the assessee to contest the case.

4. In order to appreciate the grounds raised on behalf of the department before us, it is necessary to look at relevant statutory provision holding the field at the relevant time. Section 32A(1) and 32A(2)(a) and (b) deal with investment allowance and read as under:

32A. Investment allowance- (1) In respect of a ship or an aircraft or machinery or plant specified in sub-section (2), which is owned by the assessee and is wholly used for the purposes of the business carried on by him, there shall, in accordance with and subject to the provisions of this section, be allowed a deduction, in respect of the previous year in which the ship or aircraft, was acquired or the machinery or plant was installed or, if the ship, aircraft, machinery or plant is first put to use in the immediately succeeding previous year, then, in respect of that previous year, of a sum by way of investment allowance equal to twenty-five per cent of the actual cost of the ship, aircraft, machinery or plant to the assessee:

Provided that in respect of a ship or an aircraft or machinery or plant specified in sub-section (8B), this sub-section shall have effect as if for the words ''twenty-five per cent'' the words ''twenty per cent'' had been substituted:

Provided further that no deduction shall be allowed under this section in respect of -

(a) any machinery or plant installed in any office permises or any residential accommodation, including any accommodation in the nature of a guest house;

(b) any office appliance or road transport vehicles;

(c) any ship, machinery or plant in respect of which the deduction by way of development rebate is allowable u/s 33; and

(d) any machinery or plant, the whole of the actual cost of which is allowed as a deduction (whether by way of depreciation or otherwise) in computing the income chargeable under the head ''Profits and gains of business or profession'' of any one previous year.

Explanation: For the purposes of this sub-section, ''actual cost'' means the actual cost of the ship, aircraft, machinery or plant to the assessee as reduced by that part of such cost which has been met out of the amount released to the assessee under sub-section (6) of section 32AB.

(2). The ship or aircraft or machinery or plant referred to in sub-section (1) shall be the following, namely: -

(a) a new ship or new aircraft acquired after the 31st day of March, 1976 by an assessee engaged in the business of operation of ships or aircraft;

(b) any new machinery or plant installed after the 31st day of March, 1976,-

(i) for the purposes of business of generation or distribution of electricity or any other form of power; or

(ii) in a small-scale industrial undertaking for the purposes of business of manufacture or production of any article or thing; or

(iii) in any other 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:

Provided that nothing contained in clauses (a) and (b) shall apply in relation to,-

(i) a new ship or new aircraft acquired, or

(ii) any new machinery or plant installed,

after the 31st day of March, 1987 but before the 1st day of April, 1988, unless such, ship or aircraft is acquired or such machinery or plant is installed in the circumstances specified in clause (a) of sub-section (8B) and the assessee furnishes evidence to the satisfaction of the Assessing Officer as specified in that clause;

5. A mere look at the aforesaid provisions shows that before any machinery or plant referred to in sub-section (1) of section 32A can earn the benefit of investment allowance for the assessee, it must be further shown by the assessee that the new machinery or plant installed after 31-3-1976 was of the assessee which is an industrial undertaking and which utilises the same for the purpose 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. When we turn to Eleventh Schedule, we find that construction of roads is not an item covered by the said Schedule.

6. In the light of the aforesaid statutory provisions, the claim of the assessee will have to be examined. So far as the contention of the learned standing counsel for the revenue is concerned, it may be noted that there is no statutory definition of the words ''industrial undertaking''. It cannot be disputed that the assessee was carrying on business of construction of roads. But whether it was an industrial undertaking or not was the only question canvassed in the forefront before us. As there is no statutory definition of the words ''industrial undertaking'', the common parlance test has to be adopted in this connection. That was precisely done by the Karnataka High Court in Shankar Construction Co. Vs. Commissioner of Income Tax, . In that case the Division Bench of the Karnataka High Court was concerned with the question whether the assessee carrying on construction of dams and channels could be said to be carrying an industrial activity within the meaning of section 32A. The Division Bench speaking through M.P. Chandrakantaraj Urs, J. observed that ''in construing words, in the absence of a statutory definition, it would be open to look for the meaning by reference to definitions in sister legislation and, falling that, to adopt the meaning in common parlance''. It was further observed that investment allowance can be claimed by an ''industrial undertaking". The expression ''industrial undertaking'' has not been defined in the Act; ''industry'' is a term of wide import. Where there is (i) systematic activity; (ii) organised by cooperation between employer and employee; (iii) for the production and/or distribution of goods and services calculated to satisfy human wants and wishes, prima facie, there is an industry. ''Undertaking'' is in actual effect an activity of man which, in commercial or business parlance, means an activity engaged in with a view to

earn profit.

7. The aforesaid observations were based on the decision of the Supreme Court in Bangalore Water Supply & Sewerage Board v. A. RaJappa AIR 1978 SC 548 and other decisions on the point. We respectfully agree with the aforesaid reasoning and observations of the Division Bench of the Karnataka High Court. It cannot be disputed that the assessee was carrying on systematic activity organised by co-operation between employer and employees for the production and/or distribution of goods and services calculated to satisfy human wants and wishes. Construction of roads would, therefore, squarely fall within the meaning of the words ''industrial activity'' which was undertaken by the assessee. We may also in this connection usefully refer to the decision of the Division Bench of the Orissa High Court in Commissioner of Income Tax Vs. N.C. Budharaja and Company, . It is true that in that case, the Orissa High Court was concerned with the connotation of the term ''industrial undertaking'' as found in section 80HH of the Act. In that case the assessee had undertaken the construction of irrigation project. The question was whether that type of work could be said to be constituting the assessee as an industrial undertaking. R.N. Misra, J. speaking for the Bench observed that ''the law is fairly settled that in the absence of a statutory definition, it would be open to look for the meaning by reference to definitions in sister legislation and, failing that, to adopt the meaning in common parlance. The concept of industrial undertaking need not necessarily be confined to manufacture and production of articles. Even in the absence of either of them, in the strict sense there could be an industrial undertaking. The business of a contractor who had undertaken the construction of an irrigation project would be an industrial undertaking for the purposes of the Industrial Disputes Act, 1947 and, therefore, the assessee could be said to be carrying on ''industrial undertaking''. We respectfully agree with the aforesaid decision of the Orissa High Court. In that view of the matter, therefore, the first objection raised by the learned standing counsel for the revenue has to be rejected by holding that the assessee which was carrying on the business activity of construction of roads their repairs and laying and widening of new roads, did constitute an industrial undertaking within the meaning of section 32A.

8. The second objection highlighted by the learned standing counsel for the revenue is that, even assuming that it is so, the assessee cannot be said to have manufactured or produced any article or thing. On the express statutory scheme of section 32A(1) and (2), which we have extracted earlier, it is not possible to agree with this contention for the simple reason that what the industrial undertaking has to do is to get engaged in business of construction, manufacture or production of any article or thing and such article or thing should not be one specified in the list in the Eleventh Schedule. As we have noted earlier, the Eleventh Schedule which includes such article or thing does not cover the construction or repairs or widening of roads which was undertaken by the assessee. So, on the express language of these provisions, the assessee can be said to have fulfilled the requirements of section 32A(2)(b)(ii) and (2)(b)(iii). It

also has to be noted that the words ''article or thing'' are not defined by the Act. Therefore, if we apply the common parlance test, anything visible to eye would be a thing or an article. It cannot be disputed that constructed road or repaired road or widened road would not be visible to the eye. Therefore, it can safely be said to be an article or thing produced or constructed by the assessee. The learned standing counsel for the revenue submitted that even if apparently it may so appear in the light of the express language employed by the Legislature in section 32A(2)(b)(ii) and (2)(b)(iii), looking to the legislative history of the provision, a restricted meaning requires to be given to the words ''article or thing'' and they must be confined to only goods or movable articles of the nature of the industrial merchandise. In order to support this contention of his, he took us to the earlier provision of section 32A as introduced in 1976 for that purpose. He invited our attention to [1976] 102 ITR (St.) 104 wherein the Finance Bill, 1976 is reproduced, introducing the insertion of new section 32A as per clause (8) at page 111. it was observed that section 32A as introduced earlier in 1976 reads as under:

32A. Investment allowance. -(1) In respect of a ship or an aircraft or machinery or plant specified in sub-section (2), which is owned by the assessee and is wholly used for the purposes of the business carried on by him, there shall, in accordance with and subject to the provisions of this section, be allowed a deduction, in respect of the previous year in which the ship or aircraft was acquired or the machinery or plant was installed or, if the ship, aircraft, machinery or plant is first put to use in the immediately succeeding previous year, then, in respect of that previous year, of a sum by way of investment allowance equal to twenty-five per cent of the actual cost of the ship, aircraft, machinery or plant to the assessee:

Provided that no deduction shall be allowed under this section in respect of-

(a) any machinery or plant installed in any office premises or any residential accommodation, including any accommodation in the nature of a guest-house;

(b) any office appliances or road transport vehicles:

(c) any ship, machinery or plant in respect of which the deduction byway of development rebate is allowable u/s 33; and

(d) any machinery or plant, the whole of the actual cost of which is allowed as a deduction'' (whether by way of depreciation or otherwise) in computing the income chargeable under the head Profits and gains of business or profession'' of any one previous year.

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(2) The ship or aircraft or machinery or plant referred to in sub-section (1) shall be the following, namely:--

(a) a new ship or new aircraft acquired after the 31st day of March,1976, by an assessee engaged in the business of operation of ships or aircraft;

(b) any new machinery or plant installed after the 31st day of March,1976,-

(i) for the purposes of business of generation or distribution of electricity or any other form of power; or

(ii) for the purposes of business of construction, manufacture or production of any one or more of the articles or things specified in the list in the Ninth Schedule; or

(iii) in a small-scale industrial undertaking for the purposes of business of manufacture or production of any other articles or things.

9. A mere look at the said provision shows that section 32A(2)(b)(ii) provided that for the purpose of business of construction, manufacture or production of any one or more of the articles or things specified in the Ninth Schedule, investment allowance was permissible under the said provision. Thus, Ninth Schedule at the relevant time was inclusive of articles or things the construction, manufacture or production of which by new machinery or plant would entitle the assessee to investment allowance. When we turn to Ninth Schedule as then existing and which subsequently got deleted, we find only specific articles or items enumerated therein and they were all in the nature of movable properties. Therefore, in the light of the Ninth Schedule the words ''articles or things'' necessarily got restricted meaning thereby covering only those articles or things which were listed in the Ninth Schedule and which were of movable nature. If the matter had stood at that stage, then the learned standing counsel would have been on a firm footing. But the said scheme has been given a go-by by a subsequent amendment to section 32A. That amendment was brought about in 1978 by the Finance Act No. 2 of 1977. In that connection, the Finance Minister''s Second Budget Speech for 1977-78 found in [1977] 107 ITR (St.) 65 was brought to our notice. This is what the Finance Minister observed while introducing the amendment to section 32A with a view to enlarging its network:

With a view to stimulating industrial development and economic growth, I consider it desirable to widen the scope of the scheme of investment allowance introduced last year. That Scheme has unfortunately not laid down any well defined and clear criteria for selecting industries to which the benefit of the concession was to be extended. This made it difficult to explain to those claiming eligibility why some industries had been given the benefit, while it was denied to others. Since there is a need for encouraging generation of internal resources for financing investment, I, consider it best to extend the scope of investment allowance to all industries except those which are engaged in the manufacture of the specified low priority items such as cigarettes, cosmetics and alcoholic beverages. This measure will be of great benefit to the economy." [1977] 107 ITR (St.) 66

10. Relying on this, it was submitted that the Finance Minister proposed an

amendment to section 32A(2)(b)(iii) and wanted to bring in the network of section 32A high priority items. That would still remain in the realm of movable properties. It is not possible to agree with this contention as, apart from the speech of the Finance Minister, we have to go by the express language of the statute as found at the relevant time. In fact, the statutory scheme after amendment to section 32A has undergone a sea-change and instead of inclusive items mentioned in the Ninth Schedule, namely, only movable articles or things, now a new scheme was introduced and only those articles or things which were enumerated in the Eleventh Schedule were excluded for the purpose of earning investment allowance if the assessee had engaged as an ''industrial undertaking'' for the purpose of business or construction of any of these articles or things. Article or thing is a genus of which movable articles or things may be species. But formerly in the light of the Ninth Schedule only movables were covered in the scheme of investment allowance but after the amendment and in the light of the Eleventh Schedule all the rest of the articles and things got covered by way of investment allowance provided other conditions of the section are satisfied by the concerned assessee. Consequently, it is not possible to agree with the contention of the learned standing counsel for the revenue that, even in the light of the amended statutory scheme found in section 32A(2) and even though Ninth Schedule was superseded by the Eleventh Schedule, still articles and things continued to have the same meaning which can be ascribed to them in the light of the Ninth Schedule. It is, therefore, not possible to accept the submission made on behalf of the revenue that in the light of section 32A(2)(b)(iii), articles or things manufactured or constructed by the industrial undertaking must be only movable goods or industrial merchandise. The express wordings of this provision as amended contra-indicate this contention. In this connection, we may also usefully refer to the aforesaid Orissa High Court judgment in N.C. Budharaja & Co.''s case (supra). Construing the term ''article'' as employed in section 80HH which was to be manufactured by industrial undertaking, the following observations were made by the Division Bench of the Orissa High Court:

...Assessee''s counsel has canvassed that there is no warrant for the submission of learned standing counsel that a dam would not be an article. ''Article'' according to the Shorter Oxford English Dictionary, means "a commodity; a piece of goods or property''. It need not be confined to movable property. There would be no justification to hold that a dam is not an article in that sense of the term...." (p. 218)

We respectfully agree with this line of reasoning. It cannot be seriously contended that a widened road does not result in an article or a thing as contemplated by section 32A(2)(b)(iii) as amended and as read in the light of the Eleventh Schedule. We may also in this connection usefully refer to a Division Bench judgment of this Court reported in Commissioner of Income Tax Vs. Super Drillers, In that case, this Court was concerned with the question whether drilling of tube-wells results in production of an article by the assessees as to enable it to get the benefit of section 32A. Answering the question in favour of the assessee it was held that the assessee would be entitled to the investment allowance in respect of machinery purchased for drilling borewells. Drilling operations result in production of underground water for use on the surface of the ground, and requirements of section 32A are satisfied. Water deposits lie hidden under the ground and the purpose of operating the equipment was to go into the ground and produce water lying hidden under the ground. It would be wrong to think that drilling operations do not result in the production of any article or thing. Drilling operations do result in the production of underground water for use on the surface of the ground and in that sense it must be held that the assessee is an industrial undertaking.

11. In view of the aforesaid discussion, therefore, it must be held that even the second objection raised on behalf of the revenue by the standing counsel is devoid of any merit and has to be rejected. In the result, the first question referred for our opinion is answered in the affirmative, i.e., in favour of the assessee and against the revenue. As a consequence, the second question is also answered in the affirmative, i.e., in favour of the assessee and against the revenue. No costs.