
(2001) 08 MP CK 0001

In the Madhya Pradesh High Court

Case No : IT Reference No. 38 of 1996 6 August 2001 & Income Tax R. No. 38 of 1996

Commissioner of Income Tax

APPELLANT

Vs

Mewara Construction

RESPONDENT

Date of Decision : 06-08-2001

Acts Referred:

Income Tax Act, 1961 — Section 256, 32A, 80HH, 84

Citation : (2001) 119 TAXMAN 255

Hon'ble Judges : J.G. Chitre, J;A.M. Sapre, J

Bench : Full Bench

Advocate : Patankar, for the Revenue G.M. Chaphekar and Jagat Kumar Jain, for the Assessee, for the Appellant;

Judgement

This is a reference made by the Tribunal at the instance of the revenue u/s 256(1) of the Income Tax Act, 1961 (hereinafter referred to as the Act) to answer following question of law :

"1. Whether, on the facts and in the circumstances of the case, the assessee is entitled for investment allowance u/s 32A when its activity is construction of road?"

2. The aforesaid question arises on following facts as contained in statement of case sent by the Tribunal.

3. The assessee is a firm engaged in the business of civil contracts. It also claims to undertake the work of construction of roads. For the assessment year 1987-88, the assessee claimed investment allowance of Rs. 1,62,163 in respect of machinery costing Rs. 6,48,651 u/s 32A of the Act. The assessing officer negated the claim of the assessee and declined to grant the relief so claimed. The assessee then filed appeal to the Commissioner (Appeals). The Commissioner (Appeals) allowed the appeal filed by the assessee and held that looking to the business of the assessee, they are entitled to claim the investment

allowance on the amount invested in machinery. The revenue, therefore, filed an appeal to the Tribunal against the order of the Commissioner (Appeals). The Tribunal dismissed the appeal and upheld the order of the Commissioner (Appeals). The revenue then requested the Tribunal to refer the question to this court u/s 256(1) for answer. Since the Tribunal declined to make the reference sought, the revenue came to this court u/s 256(2). This court in M.C.C. No. 342 of 1992 by its order dated 26-3-1996 allowed the application made by the revenue and asked the Tribunal to refer the aforesaid question of law said to arise out of the order of the Tribunal. It is then the Tribunal referred the aforesaid question to this court for answer on merits.

4. Heard Shri Patankar, the learned counsel for the revenue and Shri G.M. Chafekar, the learned senior advocate, assisted by Shri J.K. Jain, for the respondent.

5. The learned counsel for the revenue urged that the question referred to this court now stands concluded by the decision of the Apex Court rendered in the case of Commissioner of Income Tax, Orissa and Others Vs. N.C. Budharaja and Company and Others, which was rendered pending this reference. It was his submission that in view of law laid down by their Lordships in N.C Budharaja & Co.s case (supra), the answer to the question has to be in favour of the revenue for the reason that the activity undertaken by the assessee in this case does not amount to manufacture like the one involved in N.C. Budharaja & Co."s case (supra) and, hence, the assessee cannot claim the investment allowance u/s 32A on an investment that they have made on machinery.

6. In reply, the learned counsel for the assessee made attempt to distinguish the case of N.C Budharaja & Co. (supra). According to the learned counsel, in view of facts found in this case, the ratio of N.C. Budharaia & Co. (supra) has no application to the facts of this case. The learned counsel urged that in the present case the assessee is found to be engaged in the construction of roads which involves manufacturing activities and, hence, attracts the provisions of section 32A *ibid*. The learned counsel also relied on two decisions in Commissioner of Income Tax Vs. Bakhtawar Singh, and Commissioner of Income Tax Vs. Asian Techs Ltd., .

7. Having heard the learned counsels for the parties and having perused the entire record of the case, we are of the view that this reference has to be answered in favour of revenue rather than that of assessee.

8. In our opinion, the question involved in this reference is squarely covered and answered by the Supreme Court in the case of N.C. Budharaja & Co. (supra). One of the questions that fell for consideration before their Lordships was whether the construction of dam (reservoir) can be characterised as amounting to manufacturing or producing an article or articles as the case may be. Their Lordships then examined the literal meaning of the words "manufacture" and article in the context of section 80NH and section 32A *ibid* and held as under :

"... Can we say that the word "articles" in the said clause comprehends and takes within its ambit a dam, a bridge, a building, a road, a canal, and so on? We find it difficult to say so. Would any person who has constructed a dam say that he has manufactured an article or that he has produced an article? Obviously not. If a dam is an article, so would be a bridge, a road, an undergone canal and a multi-storeyed building. To say that all of them fall within the meaning of word "articles" is to overstrain the language beyond its normal and ordinary meaning. It is equally difficult to say that the process of constructing a dam is a process of manufacture or a process of production. It is true that a dam is composed of several articles; it is composed of stones, concrete, cement, steel and other manufactured articles like gates, sluices, etc. But to say that the end product, the dam, is an article is to be unfaithful to the normal connotation of the word dam is constructed; it is not manufactured or produced. The expression "manufacture" and "produce" are normally associated with movables - articles and goods, big and small - but they are never employed to denote the construction activity of the nature involved in the construction of a dam or for that matter a bridge, a road or a building. The decisions of the Bombay High Court in Commissioner of Income Tax Bombay City-I Vs. N.U.C. Private Ltd., and in CIT v. Shah Construction Co. Ltd (1983) 142 ITR 696, relied upon by Shri Murthy, are no doubt not decisions rendered u/s 80HH or u/s 84-they arose under the relevant Finance Acts, the question being whether the assesseees were industrial companies - but they do contain observations which tend to support the stand of the revenue."

9. Their Lordships also ruled that if dam is not an article, so would be a bridge, road, an underground canal. So one can safely conclude that the ratio of N.C. Budharaja & Co."s case (supra) is that construction of road also does not involve any manufacturing articles and, hence, no benefit can be given to the assessee to claim investment allowance u/s 32A. We cannot, therefore, agree to the submission of the learned counsel for the assessee on this issue. We, therefore, hold that the issue involved in this case squarely falls and is covered by the decision of the Supreme Court rendered in the case of N.C. Budharaja & Co. (supra). In our opinion, therefore, the view taken by the Commissioner (Appeals) and lastly by the Tribunal is not correct view and, hence, has to be answered in favour of the revenue.

10. In our opinion, the two cases cited by the learned counsel for the assessee are not applicable to the facts of the case and they are distinguishable. So far as the case of Asia Techs Ltd. (supra) is concerned it was a case u/s 256(2). Their Lordships were only concerned with the question whether to call for a question for answer on merits or not. In the opinion of their Lordships question of law did arise and, therefore, while allowing the application made by the revenue u/s 256(2) *ibid*. The High Court directed the Tribunal to refer the question to the High Court for answer on merits. This decision cannot be cited for the proposition advanced by the learned counsel for the assessee as it did not decide any issue, much less the issue on merits and that too in favour of the assessee. Indeed, in

this decision, the only question was whether a question of law arose out of the Tribunal's order or not. This decision, therefore, does not help the assessee at all. Similar is the case relied on by the learned counsel for the assessee in Bakhtaivar Singh's case (supra). In this case also their Lordships instead of answering the reference on merits declined to do so and remanded the case to the Tribunal to redetermine the issue in the light of law laid down by the Supreme Court in N.C. Budharaja & Co.'s case (supra). This decision also, therefore, does not lay down any law so as to take any different view on the issue.

11. Accordingly, and in view of aforesaid discussion, we answer the question referred in affirmative and in favour of the revenue and against the assessee. No costs.