(1999) 07 KL CK 0061

In the High Court Of Kerala

Case No : Income-tax Reference No. 187 of 1992

Commissioner of Income Tax APPELLANT

Vs

N.J. Albert RESPONDENT

Date of Decision : 22-07-1999

Acts Referred:
Income Tax Act, 1961 — Section 35B, 35B(1)

Citation : (2000) 241 ITR 141

Hon'ble Judges : R. Rajendra Babu, J;K.K. Usha, J

Bench : Division Bench

Advocate : P.K.R. Menon, for the Appellant; Joseph Markos and Sirijagan, for the Respondent

Judgement

K.K. Usha, J.—This reference at the instance of the Revenue arises from an order of the Income Tax Appellate Tribunal Cochin Bench in I. T. A. No. 376 (Coch.) of 1979. The relevant assessment year is 1978-79. The following question is referred for opinion of this court :

"Whether, on the facts and in the circumstances of the case, the asses-see is entitled to weighted deduction u/s 35B(1)(b) of the Income Tax Act, 1961 ?"

2. The reference was originally answered by this court in the negative, i.e., in favour of the Revenue and against the assessee by judgment dated February 11, 1987, in the light of a decision of this court in ITR Nos. 7 and 8 of 1982 reported in Commissioner of Income Tax Vs. C. Tharian and Sons, . The matter was taken in appeal by the assessee before the Supreme Court. By order dated March 24, 1999, the Supreme Court remanded the matter for fresh consideration by this court with the following observations :

"The High Court answered the questions quoted below in the negative and in favour of the Revenue in the light of its earlier decision in I. T. R. Nos. 7 and 8 of 1982- Commissioner of Income Tax Vs. C. Tharian and Sons, .

3. In Commissioner of Income Tax Vs. Kerala Nut Food Co., P. Gopinatha Pillai, M.

Shamsuddin and Co., Indian Nut Products, Asiatic Export Enterprises and General Industrial Corporation, , a Division Bench of the same High Court took note of a circular of the Central Board of Direct Taxes and certain decisions and concluded, in our view, rightly, that the decision in Commissioner of Income Tax Vs. C. Tharian and Sons, , was per incuriam. The answer by the High Court in the instant case to the question posed to it relying exclusively upon Commissioner of Income Tax Vs. C. Tharian and Sons, , must therefore, be held to be bad in law.

4. We think, in the circumstances, that the reference (R. A. No. 257/ Coch of 1981) should be restored to the file of the High Court to be heard and disposed of afresh. This shall be done expeditiously, having regard to the passage of time."

5. After remand the matter has come up for hearing. We heard learned senior standing counsel for the Revenue and counsel for the assessee. The relevant facts of the case are as follows : The assessee is a firm deriving income by way of commission. It provides services to exporters in India by obtaining information regarding markets outside India for services and other facilities, furnishes to the non-resident customers outside India samples or technical information, thus promoting sale of goods and services. The assessee-firm itself does not export any goods. For the assessment year 1978-79, the assessee claimed weighted deduction u/s 35B of the Income Tax Act, 1961, in respect of a sum of Rs. 63,492.17 comprising the expenses incurred by way of samples, postage, cables, overseas trunk calls and foreign travelling expenses. The Income Tax Officer rejected the assessee''s claim on the ground that the assessee is not an exporter and, therefore, not eligible for weighted deduction u/s 35B. On appeal by the assessee, the Commissioner of Income Tax (Appeals) held that expenses were incurred in connection with the assessee''s business of rendering services of obtaining information from outside India and furnishing to non-resident customers samples and information regarding availability of materials and, therefore, the expenses were duly covered by Sub-clauses (ii), (vi) and (vii) of Section 55B(1)(b). The assessee''s appeal was thus allowed.

6. The Revenue took up the matter before the Appellate Tribunal. The Tribunal affirmed the finding of the Commissioner of Income Tax (Appeals).

7. It is contended by learned counsel for the Revenue before us that five items of expenses, in respect of which weighted deduction was claimed by the assessee, are not incurred by it with reference to the business the assessee does, on the other hand, these expenses are incurred in furtherance of the export business of the principal of the assessee. According to learned counsel, the assessee will be entitled to claim weighted deduction, if it has incurred any expenditure for advertising its business or some other expenses incurred in connection with its business. We do not find any merit in this contention. From the nature of the business carried on by the assessee the five items of expenses incurred by it are necessarily to be taken as expenses incurred in connection with the assessee''s business. It is not disputed that the assessee rendered services to exporters from India by pbtaining information regarding markets outside India for services

and other facilities, furnishing to the non-resident customers outside India samples or technical information, thus promoting sale of goods and services and also travel undertaken outside India for the promotion of the above services or facilities. If the assessee has to carry on the above business effectively and profitably it has to get information from abroad. Such information can be collected by letters, cables, overseas trunk calls and some times it is necessary to undertake travel abroad also. Up-to-date information about the market and other facilities abroad is absolutely necessary for the improvement of the assessee''s business. Therefore, the assessee is entitled to claim weighted deduction in respect of the above mentioned items of expenditure. In Commissioner of Income Tax Vs. Orient Charterers, , a similar view has been taken by the Bombay High Court.

8. The assessee in the above case was carrying on business as freight-brokers and shipping agents. In respect of services rendered and facilities granted by it in the sphere of its activities, the assessee incurred certain expenditure like telex expenses, foreign tour expenses, cable expenses, and trunk calls to foreign countries, subscription fees to foreign magazines including advertisements, foreign books and periodicals, etc. It was held that the assessee is entitled to claim weighted deduction in respect of the above expenditure under Sub-clause (ii) and Sub-clause (vii) of Section 35B(1)(b) of the Income Tax Act.

9. Learned counsel for the Revenue placed reliance on two decisions of the Supreme Court in Commissioner of Income Tax, Delhi Vs. Stepwell Industries Ltd. and etc. etc., and Commissioner of Income Tax (CNTL), Ludhiana Vs. Hero Cycles Pvt. Ltd., Ludhiana, . After going through the above decisions we find that those decisions cannot be of any help to the Revenue. In Commissioner of Income Tax, Delhi Vs. Stepwell Industries Ltd. and etc. etc., , it was found that the assessee''s goods were sold by the State Trading Corporation of India Limited to various parties outside India. The assessee''s claim for weighted deduction u/s 35B(1)(b)(i) and (iv) was found not admissible. If the State Trading Corporation incurs expenditure for advertisement or publicity outside India, the assessee will not be entitled to any deduction unless the assessee can establish that the advertisement or publicity was being done outside India for, and on behalf of the assessee and in respect of goods the assessee deals in or provides in the course of its business. The same is the position regarding the maintenance of office or agency for promotion of sale outside India. In Commissioner of Income Tax (CNTL), Ludhiana Vs. Hero Cycles Pvt. Ltd., Ludhiana, , learned counsel for the Revenue wanted to place reliance on that portion of the decision which dealt with Civil Appeal No. 6942 of 1995 where it is observed that the expenditure in connection with establishment, bonus, leave with wages, salary to directors, postage, telephone and telegram and printing and stationery is not allowable. There is nothing to show that the expenditure on postage, telephone and telegram are in connection with communication to outside India. There is also no material to show as to whether the assessee therein has been doing a business similar to the assessee in the present case or whether such activities are in

furtherance of the assessee''s business.

10. In Commissioner of Income Tax Vs. C. Tharian and Sons, , the assessee claimed weighted deduction for the assessment years 1975-76 and 1976-77 u/s 35B(1)(b)(iii) and (viii) of the Income Tax Act, 1961, on amounts paid by way of commission to its agent in India in connection with the export of goods to a foreign country. The assessing authority disallowed the claim. On appeal, the Appellate Assistant Commissioner disallowed the claim under Sub-clauses (iii) and (viii) of Clause (b), but allowed the claims under Sub-clauses (ii), (v) and (vi) thereof. On appeal, by the Revenue, the Tribunal allowed the claims under Sub-clauses (i) and (ii) of Clause (b). A Bench of this court took the view that since the expenses were not actually incurred outside India, the assessee is not entitled to weighted deduction. The very same question came up for consideration before another Bench in Commissioner of Income Tax Vs. Kerala Nut Food Co., P. Gopinatha Pillai, M. Shamsuddin and Co., Indian Nut Products, Asiatic Export Enterprises and General Industrial Corporation, , where it took a different view referring to a circular of the Central Board of Direct Taxes dated December 28, 1981, which provided that commission payments made to parties to bring about export sales will be entitled to weighted deduction u/s 35B of the Income Tax Act, 1961, irrespective of whether the same is incurred in India or outside India. The Bench held that the agents had rendered positive and specific services for the marketing of the assessee''s goods outside India and the commission payments even though made in India were entitled to weighted deduction. The Bench took the view that Commissioner of Income Tax Vs. C. Tharian and Sons, , which did not take into consideration the abovementioned circular was rendered per incuriam. The above view taken by this court in Commissioner of Income Tax Vs. Kerala Nut Food Co., P. Gopinatha Pillai, M. Shamsuddin and Co., Indian Nut Products, Asiatic Export Enterprises and General Industrial Corporation, , was approved by the Supreme Court in the order dated March 24, 1999, remanding the present case for fresh consideration by this court.

11. Sub-clause (ii) and Sub-clause (vi) do not contain the provision that the expenditure has to be incurred outside India as in Sub-clause (iii) and Sub-clause (viii). There is no legal infirmity in the assessee''s claim under Sub-clauses (ii), (vi) and (vii). There is no reason to take a different view from that expressed by the Tribunal.

12. We, therefore, hold that the assessee is entitled to claim weighted deduction u/s 35B in respect of the expenditure incurred under the five heads mentioned above.

13. In the result, the question raised is answered in the affirmative, in favour of the assessee and against the Revenue.

14. 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.