(1989) 09 BOM CK 0105

In the Bombay High Court

Case No : Income-tax Reference No. 524 of 1976

Commissioner of Income Tax — APPELLANT

Vs

Orient Charterers — RESPONDENT

Date of Decision : 29-09-1989

Acts Referred:

Income Tax Act, 1961 — Section 35B

Citation : (1989) 80 CTR 210 : (1990) 185 ITR 354 : (1990) 48 TAXMAN 40

Hon'ble Judges : T.D. Sugla, J;S.P. Bharucha, J

Bench : Division Bench

Judgement

T.D. Sugla, J.—The two questions of law referred to this court at the instance of the Department are :

"(a) Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the weighted deduction u/s 35B should be allowed to the assessee ?

(b) Whether, on the facts and in the circumstances of the case, the Tribunal is justified in holding that the assessee''s activities are covered by sub-clauses (ii) and (vii), instead of clauses (iii) and (viii) of section 35B(1)(b) and hence holding that Explanation 2 inserted by the Finance Act, 1973, with retrospective effect from April 1, 1968, is not applicable in this case ?"

2. The assessee, a firm, carries on business as freight-brokers and shipping agents. The proceedings relate to the assessment years 1970-71 and 1971-72. During the relevant previous years, the assessee undertook to charter foreign ships for the import of foodgrains, etc., for the Government of India and received commission from the concerned shipping companies. In respect of the services rendered and facilities granted by it in the sphere of its activities, the assessee incurred certain expenditure and claimed deduction u/s 35B in respect thereof. The particulars of expenditure for the respective years are :

3. The assessee''s claim that it was entitled to deduction u/s 35B was rejected by

the Income Tax Officer who held that the assessee was not exporting any commodity nor providing and services outside India and was, therefore, not entitled to deduction u/s 35B. The Appellate Assistant Commissioner accepted the claim of the assessee for deduction u/s 35B and directed the Income Tax Officer to allow deduction after verifying the correctness of the computation of the claim. The contentions on behalf of the Department before the Tribunal were that (i) the assessee itself was not exporting any goods and was, therefore, not entitled to deduction u/s 35B(ii) that by virtue of Explanation 2 to section 35B(1) inserted by the Finance Act, 1973, with retrospective effect from April 1, 1968, the claim was not admissible in respect of expenditure falling under the sub-clauses (iii) and (viii) of section 35B(1)(b) and that expenditure was falling under these sub-clauses only, and (iii) that the assessee would be entitled to proportionate relief only, if at all, "with reference to the amounts received in rupees and the foreign exchange earned in foreign currency". The Tribunal rejected all the three contentions and dismissed the Department''s appeal.

4. Dr. Balasubramanian, learned counsel for the Department, reiterated that the assessee was not an exporter of goods, services and/or facilities. Its business was only that of a broker. It was collecting information about the availability of ships and the parties who desire to import goods. The information so collected enabled the assessee to strike a deal between the two. The exporter of the goods was also entitled to deduction u/s 35B be for the same activity. The two person cannot be entitled to deduction u/s 35B in respect of one and the same transaction. In any event, there was retrospective amendment by insertion of Explanation 2 which prohibited deduction in respect of expenditure of the nature covered by sub-clauses (iii) and (viii) of section 35B(1)(b). The expenditure involved herein was of the nature covered by the abovesaid two clauses.

5. The assessee-firm is admittedly carrying on business as freight-brokers and shipping agents. In the course of and for its business, it was necessary to collect information as to the places where goods are available for export from one country to another country and regarding the availability of ships. It is this type of information which the assessee furnishes to the ship-owners as well as to exporters of goods that enables the deals to be struck and the assessee gets brokerage or commission.

6. The question is, whether the assessee''s case falls within section 35B(1)(a) and, if so, whether the expenditure incurred by it falls under one of the nine sub-clauses mentioned in section 35B(1)(b) other than sub-clauses (iii) and (viii) as it is common ground that as a result of the insertion of Explanation 2 in section 35B(1)(b), expenditure falling under clauses (iii) and (viii) will not qualify for deduction u/s 35B(1)(b). In this background, we have carefully read clause (a) of sub-section (1) of section 35B. We do not find anything in the clause which debars a broker or agent who supplies services or facilities as distinct from goods from getting deduction u/s 35B. In fact, by its judgment dated June 13, 1978, in Income Tax Reference No. 375 of 1977, in CIT v. Indian Hotels Co. Ltd., this

court has held that the assessee whose business was merely to extend facilities and render services, was entitled to deduction u/s 35B.

7. The next question is, whether the expenditure incurred by the assessee falls under one of these nine sub-clauses to section 35B(1)(b) other than sub-clauses (iii) and (viii). The details of the expenditure have already been noted in paragraph 2 of this judgment. The expenditure in respect of which deduction is claimed can be broadly divided into two categories : (i) expenditure incurred on foreign travel, and (ii) expenses incurred in connection with and/or for obtaining information as to the exporters of goods and the availability of ships. While the expenditure on foreign travel would squarely fall under sub-clause (vii), the expenditure on obtaining information of the above nature as to the markets for services in which the assessee dealt will fall under sub-clause (ii). It is not in dispute that Explanation 2 inserted in the section with retrospective effect has no bearing on an expenditure which falls under sub-clauses other than sub-clauses (iii) and (viii). The contention that the actual exporter of goods may also be entitled to deduction u/s 35B is not relevant. In the circumstances, the Tribunal, in our judgment, rightly held that the assessee was entitled to deduction u/s 35B.

8. In the result, both the questions are answered in the affirmative and in favour of the assessee.

9. No order as to costs.

