
(1993) 07 KL CK 0038

In the High Court Of Kerala

Case No : Income-tax Reference No's. 44 and 45 of 1991

Commissioner of Income Tax

APPELLANT

Vs

Polyclinic P. Ltd.

RESPONDENT

Date of Decision : 22-07-1993

Acts Referred:

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

Citation : (1993) 115 CTR 49 : (1994) 207 ITR 185

Hon'ble Judges : K.S. Paripoornan, J; K.P. Balanarayana Marar, J

Bench : Division Bench

Advocate : P.K.R. Menon and N.R.K. Nair, for the Appellant; P.G.K. Warriyar, for the Respondent

Judgement

K.S. Paripoornan, J.—At the instance of the Revenue, the Income Tax Appellate Tribunal has referred the following question of law for the decision of this court :

"Whether, on the facts and in the circumstances of the case :

(i) the business of the assessee could be treated as one producing an article or thing for the purpose of granting investment allowance under the Income Tax Act, 1961 ?

(ii) the assessee is entitled to investment allowance u/s 32A(2)(iii) of the Income Tax Act, 1961 ?"

2. The respondent/assessee is a limited company. It is running a clinical laboratory, X-ray unit and pharmacy. We are concerned with the assessment years 1980-81 and 1983-84. The assessee claimed investment allowance u/s 32A(2) of the Income Tax Act for the X-ray plant installed during the relevant accounting year. The Income Tax Officer declined to grant the relief for both the years. According to him, the X-ray plant is not used for the production or manufacture of a thing or article. The assessment orders are dated July 21, 1981, and April 25, 1984. The appeal filed before the Commissioner of Income Tax (Appeals), for the year 1980-81, was disposed of on August 23, 1984. The

appeal filed for the year 1983-84 was disposed of by the Commissioner of Income Tax (Appeals) on August 10, 1987. The Commissioner of Income Tax (Appeals), by relying on the decision of the Income Tax Appellate Tribunal, Bangalore Bench, in the case of first ITO v. Dr. P. Vittal Bhat [1984] 16 Taxman 8, held that, when a raw film is exposed, the resultant X-ray photograph is an article produced by the X-ray machine and hence the business should be treated as one producing an article or thing for the purpose of granting investment allowance. The Revenue filed appeals as I. T. A. No. 872/(Coch) of 1984 and I. T. A. No. 1168/(Coch) of 1987, before the Income Tax Appellate Tribunal, Cochin Bench, and assailed the order passed by the Commissioner of Income Tax (Appeals). The issue involved in both the appeals was the same. The Tribunal posed the question thus :

"Whether the assessee, a limited company, who is giving clinical laboratory services, would be entitled to investment allowance in respect of certain machineries like X-ray plant ?"

3. The Tribunal upheld the decision of the Commissioner of Income Tax (Appeals) for the reasons stated by the Special Bench in Dr. P. Vittal Bhat's case [1984] 16 Taxman 8 and dismissed the appeals filed by the Revenue. It is thereafter at the instance of the Revenue that the Income Tax Appellate Tribunal has referred the questions of law, formulated hereinabove, for the decision of this court.

4. We heard counsel for the Revenue, Mr. N.R.K. Nair, as also counsel for the respondent/assessee, Mr. P.G.K. Warriyar. According to counsel for the Revenue, the Commissioner of Income Tax (Appeals) as also the Appellate Tribunal erred in placing reliance on the decision of the Special Bench of the Tribunal in Dr. P. Vittal Bhat's case [1984] 16 Taxman 8, wherein the scope of Section 32A(2)(b)(ii) of the Act alone came up for consideration. Counsel for the Revenue submitted that, u/s 32A(2)(b)(ii) read with item No. 10 of the Eleventh Schedule, the assessee will be disentitled to investment allowance.

5. We shall extract Section 32A(1), 2(b)(ii) and (iii) and the Eleventh Schedule, item No. 10, of the Income Tax Act :

"32A, (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

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

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

(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."

"THE ELEVENTH SCHEDULE List of articles or things 10. Photographic apparatus and goods."

6. Though in the decision of the Special Bench of the Tribunal Section 32A(1) and (2) have been quoted in full, the Bench considered the matter only from the perspective of Section 32A(2)(b)(ii) of the Act, as is evident from paragraph 14 of the order. The Tribunal posed the question as to whether there was a manufacture or production of an article or thing as the expression is used in Section 32A(2)(b)(ii) of the Act. There is a substantial difference between Section 32A(2)(b)(ii) and (iii). The question referred to this court is whether the assessee is entitled to investment allowance u/s 32A(2)(b)(ii) of the Income Tax Act. There is no case nor is it discernible from the papers that the assessee is a small-scale industrial undertaking. So, obviously, Section 32A(2)(b)(ii) is inapplicable. The question referred to this court also proceeds on the basis that the plea of the assessee is one based on Section 32A(2)(b)(ii) of the Income Tax Act. The assessing authority did not refer in terms to the section or any sub-section. In considering the appeal for the year 1980-81, the Commissioner of Income Tax (Appeals), in his order dated August 23, 1984, in paragraph 6, referred to Section 32A(2)(b)(ii) but followed the decision in Dr. P. Vittal Bhat's case [1984] 16 Taxman 8. The exact provision of law was not referred to by the Commissioner of Income Tax (Appeals) while considering the appeal for the year 1983-84. The common order dated July 21, 1989, of the Income Tax Appellate Tribunal has not referred to the relevant statutory provision. It has posed the question as to whether the assessee, a limited company, who is giving clinical laboratory services, would be entitled to investment allowance in respect of certain machinery like X-ray plant. Holding that the Commissioner of Income Tax (Appeals) has allowed it based on the decision of the Special Bench of the Tribunal in Dr. P. Vittal Bhat's case [1984] 16 Taxman 8, and expressing agreement with the order of the Commissioner of Income Tax (Appeals) and the decision of the Special Bench of the Tribunal, the Appellate Tribunal dismissed the Departmental appeals. The appellate order passed by the Income Tax Appellate Tribunal dated July 21, 1989, is cryptic. It is vague. We do not know the statutory provision under which the Tribunal considered the matter. But, we have to take it that the Tribunal had in mind Section 32A(2)(b)(ii) of the Act, since in referring the question of law to this court u/s 256(1) of the Act the Tribunal has in terms referred to Section 32A(2)(b)(ii) of the Income Tax Act.

7. Prima facie, the decision of the Special Bench of the Tribunal in Dr. P. Vittal

Bhat's case [1984] 16 Taxman 8 may not be an authority to hold that the assessee is entitled to investment allowance u/s 32A(2)(b)(ii) of the Act. The Tribunal was probably under the impression that in Dr. P. Vittal Bhat's case [1984] 16 Taxman 8, the above provision of law was considered or explained. It is not so. Since the order of the Tribunal is vague and we are not in a position to know under what statutory provision of law the entitlement of the investment allowance was considered and how the decision in Dr. P. Vittal Bhat's case [1984] 16 Taxman 8 was held to be applicable, we are not in a position to satisfactorily answer the questions of law referred to this court for decision.

8. We decline to answer the questions referred to this court. But, we direct the Income Tax Appellate Tribunal to restore the appeals to file and decide the matter afresh by pointedly referring to the particular provision of law applicable in the instant case and decide whether and to what extent the decision of the Special Bench of the Tribunal in Dr. P. Vittal Bhat's case [1984] 16 Taxman 8 is applicable.

9. We are not expressing any opinion regarding the correctness or otherwise of the decision in Dr. P. Vittal Bhat's case [1984] 16 Taxman 8. We decline to answer the questions referred to this court. We direct the Income Tax Appellate Tribunal to hear the appeals afresh.

10. The references are disposed of as above.

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