(1998) 11 BOM CK 0086

In the Bombay High Court

Case No : Income Tax Reference No. 82 of 1988

Commissioner of Income Tax APPELLANT

Vs

Shah Construction Co. Ltd. RESPONDENT

Date of Decision : 25-11-1998

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

Citation : (1999) 237 ITR 814 : (1999) 103 TAXMAN 175

Hon'ble Judges : Pratibha Upasani, J;B.P. Saraf, J

Bench : Division Bench

Advocate : R.V. Desai and B.M. Chatterjee, for the Appellant; S.J. Mehta and I.M. Munim, for the Respondent

Judgement

Dr. B.P. Saraf, J. 1. By this reference u/s 256(1) of the Income Tax Act, 1961, the Income Tax Appellate Tribunal has referred the following questions of law to this court for opinion at the instance of the Revenue :

"1. Whether, on the facts and in the circumstances of the case, and in law, the Tribunal was right in holding that the business of construction carried on by the assessee is an ''industrial undertaking'' ?

2. Whether, on the facts and in the circumstances of the case, the business of construction (of this industrial undertaking) is by itself not eligible to investment allowance u/s 32A(2)(b)(iii) ?

3. Whether, on the facts and in the circumstances of the case and in law, the assessee''s business activity is also business of construction of thing to be entitled to investment allowance u/s 32A(2)(b)(iii) ?

4. Whether, on the facts and in the circumstances of the case and in law, the Tribunal was right in holding that the dumpers used by the asses-see in the execution of civil engineering contract work were not ''road transport vehicles'' so as to fall within the proviso (b) to Section 32A(1), and granting investment allowance of Rs. 1,19,930 thereon ?

5. Whether, on the facts and in the circumstances of the case and in law, the Tribunal was right in holding that the amount in credit in the foreign exchange reserve account represented profit or gain of the assessee when the foreign currency had been converted into rupees at the rate prevailing at the end of the year only for account purposes, although it had remained outside India, when such foreign currency had not been adjusted during this year, and, on these premises, deleting the addition of Rs. 4,59,098 ?"

2. So far as questions Nos. 1 to 4 are concerned, learned counsel for the parties are agreed that the controversy therein now stands concluded in favour of the Revenue by the decision of the Supreme Court in Commissioner of Income Tax, Orissa and Others Vs. N.C. Budharaja and Company and Others, .

Following the above decision, we answer the first four questions as below :

Question No. 1.-- in the negative, i.e., in favour of the Revenue.

Question No. 2.-- in the affirmative, i.e., in favour of the Revenue and against the assessee.

Question No. 3.-- in the negative, i.e., in favour of the Revenue and against the assessee.

Question No. 4.-- in the negative, i.e., in favour of the Revenue and against the assessee.

3. The only question that requires consideration is question No. 5. The material facts necessary for deciding the controversy in this question, briefly stated, are as follows :

The assessee had taken up some contract works in the Middle East countries. Against such contracts, advances were received by the assessee, which had to be adjusted against the running bills submitted by the assessee from time to time. At the end of the accounting year relevant to the assessment year 1979-80, certain foreign currency had remained in reserve and for account purposes, they were converted into Indian rupees at the prevailing rate. The amount of foreign exchange/reserve in terms of Indian rupees was Rs. 4,59,098. The Income Tax Officer brought this amount to tax in the hands of the assessee. The assessee appealed to the Appellate Assistant Commissioner of Income Tax (Appeals). The Appellate Assistant Commissioner deleted the addition, as he was of the opinion that the credit balance in the foreign exchange reserve account, in the facts and circumstances of the case, did not represent any profit or gain taxable under the Act. The order of the Appellate Assistant Commissioner (Appeals) was confirmed by the Income Tax Appellate Tribunal ("the Tribunal"), Hence, this reference at the instance of the Revenue.

4. We have heard Mr. R. V. Desai, learned counsel for the Revenue, as also, Mr. S. J. Mehta, learned counsel for the assessee. The uncontroverted factual position is that the amount in question lying in the exchange reserve account did

not even belong to the assessee. It was a part of the amount received by the assessee from the parties in the Middle East by way of advance to be adjusted against the running bills. Till it was adjusted against the running bills, it did not belong to the assessee. The conversion into Indian rupees at the end of the year obviously was only for account purposes. That being so, the said amount cannot be regarded as income of the assessee. In these facts and circumstances of the case, the, Tribunal, in our opinion, was correct in its conclusion that until these amounts were adjusted against future bills, the question of regarding the same as income and assessing to tax cannot arise. Accordingly, we answer question No. 5 in the affirmative, i.e., in favour of the assessee and against the Revenue.

5. Reference disposed of accordingly with no order as to costs.

