
(1984) 04 DEL CK 0019

In the Delhi High Court

Case No : Income-tax Case No. 174 of 1980

Commissioner of Income Tax, Delhi-I

APPELLANT

Vs

Jay Engineering Works

RESPONDENT

Date of Decision : 30-04-1984

Acts Referred:

Citation : (1984) 149 ITR 297 : (1984) 19 TAXMAN 587

Hon'ble Judges : D.P Wadhwa, J;D.K. Kapur, J

Bench : Division Bench

Judgement

Kapur, J.—By these two applications under s. 256(2) of the I.T. Act, 1961, the Commissioner has sought reference regarding the following five questions relating to assessment year 1972-73 :

(In ITC No. 174/80)

"Whether, on the facts and in the circumstances of the case, the Tribunal is legally correct in holding that the commission payments of Rs. 6,89,236, Rs. 67,254 and Rs. 3,500 qualify for deduction under s. 35B ?

(In ITC No. 175/80)

1. Whether, on the facts in the circumstances of the case, the Tribunal is legally correct in holding that the commission payments of Rs. 6,89,236, Rs. 67,254 and Rs. 3,500 qualify for deduction u/s 35B ?

2. Whether, on the facts and in the circumstances of the case, a portion of the salary paid to staff for the period they were away on foreign tour would qualify for deduction u/s 35B ?

3. Whether, on the facts and in the circumstances of the case, the cost of D. D. Stamps amounting to Rs. 6,047 would qualify for deduction under s. 35B ?

4. Whether, on the facts in the circumstances of the case, the Tribunal is legally correct (in holding) that the commission payments, a portion of the staff salaries

and the cost of D. D. stamps could be held to be expenditure incurred wholly and exclusively on any of the purposes mentioned in clause (b) of sub-section (1) of section 35B ?"

2. Learned counsel for the assessed contended that similar questions had been raised in previous years also, but both the Appellate Tribunal as well as the High Court had rejected the applications under s. 256 of the Act. Reference was made to I.T.C. No. 52 of 1980, decided on May 19, 1982, which relates to one of the earlier years.

3. The Tribunal, while rejecting the application under s. 256(1), referred to the fact that in earlier orders, the Tribunal had rejected the application for reference on the ground that the decision of a Special Bench of the Income Tax Appellate Tribunal was being followed for a number of years and it appeared that the Department had accepted that decision. It is necessary to quote the Tribunal's words :

".... Accordingly, the Bench held that as it had only followed the special Bench order and as that order has been accepted by the Department, there was no justification for allowing any question of law to be raised on an issue which already stands settled. The Bench also observed that in an All-India statute, uniformity of action on the part of the Department is desirable."

4. We may also mention that the decision of the Bombay Bench of the Tribunal was referred to in the previous decision of this court already referred to. The Bench had observed as follows in para. 28 of their order :

"28. The commission payment in this case was to parties who brought about the export sales. It was those parties who furnished information to the assessed about the foreign buyers and published the assessed's goods to those buyers. It was they who brought together the buyers and the seller for concluding the sales. It was through them that the goods were supplied outside India. That beings so this expenditure is allowable under sub-clauses (i) and (ii) of the clause (b) sub-section (1) of section 35B".

5. On an application of the is conclusion to the facts of the case, it was concluded in the previous order that the weighted deductions made under s. 35B did not raise a question of law but were really questions of fact.

6. Learned counsel for the Department has referred to a recent decision of the Madras High Court in V.D. Swami and Co. Pvt. Ltd. Vs. Commissioner of Income Tax, Tamil Nadu-I, , to contend that the expenditure to be allowed under s. 35B had to be an expenditure incurred outside India and could not include expenditure in India.

7. We have carefully examined that decision, but find that in that case the deduction was claimed under s. 35B(1)(b)(iii) of the Act. That provision especially provides that expenditure in India has to be exclude but there is no such restriction in the case of other clauses when the allowance is claimed.

8. No doubt, most of the expenditure which is allowable under s. 35B has to be incurred outside India, but, as observed by the Special Bench of the Appellate Tribunal, that expenditure may be incurred through an agent, who publicizes the goods and advertises them outside the country. It was on that basis that the commission was allowed, though paid in India to the persons who publicized the goods outside India and obtained information regarding markets outside India. The real question to be ascertained by the Tribunal was whether the expenditure in question fell within the provisions relating to the allowance as enumerated in s. 35(1)(b) as it then stood.

9. It may be observed that the conduct of a publicity campaign outside India or taking steps to obtain customers outside India could be managed by the assessee itself, but generally in such cases the publicity and other steps necessary in order to attract customers from abroad cannot conveniently be taken by the India exporter and generally it would have to be done either through a foreign party or a competent (Indian) party with expertise in this matter. It makes little difference whether payment is made in foreign currency to a foreign party to do the publicity, or to an Indian party to do the same thing. The main point is that the expenditure in question should be attributed towards the matters enumerated in clause (b) of s. 35B.

10. However, the main point urged by Mr. Wadhwa has been that the expenditure should be incurred outside India and should not be incurred in India. He, Therefore, submits that we should not follow the previous judgment of this court. In this connection, it is necessary to point out that in s. 35B(1)(b)(iii) the following words occur :

"..... not being expenditure incurred in India in connection therewith or expenditure (wherever incurred) on the carriage of such goods to their destination outside India or on the insurance of such goods while in transit."

11. This means that expenses incurred in India is not allowable in respect of the goods supplied outside India nor is the expenses on carriage or insurance of such goods allowable. This disallowance of expenditure in India is restricted to the expenditure on the goods themselves. On the other hand, the advertisement or publicity outside India visualised by sub-clause (b)(i), or obtaining information of markets outside India as visualised in sub-clause (b)(ii), or preparation of tenders for the supply of those goods, etc., as visualised by sub-clause (b)(v), or furnishing of samples or technical information to persons outside India as visualised by sub-clause (b)(vi), or the expenses for traveling from India and return to India as visualised by sub-clause (b)(vii), or even the performance of service outside India as visualised by sub-clause (b)(viii), or such activities for the promotion of sales outside India as visualised by sub-clause (b)(ix) (which may be paid in India) are all expenses which might reasonably be incurred in India currency in India or they may be incurred outside India, as the case may be. There is nothing in these clauses to indicate that the expenses must be incurred only outside India. In fact, the language shows just the opposite in

many of the sub-clauses. So, the contention of Mr. Wadhera must be restricted to those matters which fall within the particular sub-clauses restricted to expenditure only outside India such as sub-clauses (b)(iii) or (b)(iv), which visualise expenditure only outside India.

12. In our view, the question raise only a question of fact similar to, or the same as were raised in the previous years. We accordingly reject the applications but leave the parties to bear their own costs.