(2000) 09 GUJ CK 0090

In the Gujarat High Court

Case No : Income-tax Reference No. 117 of 1985

Krishnakeshsav Laboratories Ltd. APPELLANT

Vs

Commissioner of Income Tax RESPONDENT

Date of Decision : 26-09-2000

Acts Referred:
Income Tax Act, 1961 — Section 35B, 40A(5)

Citation : (2002) 254 ITR 149 : (2002) 124 TAXMAN 810

Hon'ble Judges : D.M. Dharmadhikari, C.J;Anil R. Dave, J

Bench : Division Bench

Advocate : J.P. Shah, for the Appellant; Manish R. Bhatt, for the Respondent

Judgement

A.R. Dave, J.—At the instance of the assessee, the following questions have been referred to this court for the assessment years 1978-79

and 1979-80 for its opinion under the provisions of Section 256(1) of the Income Tax Act, 1961 (hereinafter referred to as ""the Act"") :

2. Questions for the assessment year 1978-79 :

Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in holding that the salary paid to the employee of the

appellant for the period during which he was in foreign country should be considered for the purpose of determining the disallowance under Sub-

section (5) of Section 40A of the Income Tax Act, 1961 ?

Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was right in law in confirming the order of the Commissioner of

Income Tax appeals holding that the freight and insurance charges of Rs. 1,37,639 were not eligible for weighted deduction u/s 35B of the Income

Tax Act, 1961 ?

3. Question for assessment year 1979-80 :

Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in holding that the salary paid to the employee of the

appellant for the period during which he was in foreign country should be considered for the purpose of determining the disallowance under Sub-

section (5) of Section 40A of the Income Tax Act, 1961 ?

4. So far as the first question referred to this court for the assessment year 1978-79 and the question referred to this court for the assessment year

1979-80 is the same, we answer the said question by a common answer.

5. have heard the learned advocate, Mr. J.P. Shah, appearing for the assessee, and Mr. Akil Qureshi for the Revenue. The learned advocates

appearing for the parties have submitted that both the questions referred to this court have been now squarely covered by the judgments delivered

by the Supreme Court and by this court.

6. ar as the first question is concerned, it pertains to disallowance under Sub-section (5) of Section 40A of the Act. The said question has been

answered by the Supreme Court in Commissioner of Income Tax, Delhi (Central-I) Vs. M/s. Continental Construction Ltd., . The question

pertains to the amount of salary paid to a director, who was also an employee of the assessee-company, when the said director was outside the

country. It has been held by the Supreme Court in the case of Commissioner of Income Tax, Delhi (Central-I) Vs. M/s. Continental Construction

Ltd., , that when an employee is given salary in respect of any period of his employment outside India, the amount of salary paid to such an

employee would not be subject to disallowance under Sub-section (5) of Section 40A. In view of the law laid down by the Supreme Court, it is

clear that the assessee will get deduction of the amount of salary paid to an employee, who was outside India, without suffering from disallowance

under the provisions of Section 40A(5) of the Act. Thus, we decide the said question in favour of the assessee and against the Revenue. The

Supreme Court has come to the said conclusion for the reason that provisions of Section 40A(5)(b) provide that nothing in Clause (a) would apply

to any salary or allowance paid to an employee in respect of his employment outside India. By virtue of the said exception provided in Section

40A(5)(b), it is very clear that the amount of salary paid to an employee during his period of employment outside India cannot be disallowed or

cannot be subject to the ceiling prescribed u/s 40A(5)(a).

7. ar as the second question is concerned, it is submitted by the learned advocate that the said question has also been covered by the judgment

delivered in the case of Commissioner of Income Tax Vs. M.M. Khambhatwala, . The assessee had paid freight and insurance charges to the tune

of Rs. 1,37,639 in the process of exporting goods and the assessee had claimed weighted deduction u/s 35B of the Act. It has been held in the

case of Commissioner of Income Tax Vs. M.M. Khambhatwala, , that such amount, i.e., the amount of premium, freight, etc., spent by the

assessee in the process of exporting goods cannot be considered while calculating the weighted deduction u/s 35B of the Act. In view of the said

judgment, we have to answer this question in favour of the Revenue and against the assessee.

8. Thus, we answer question No. 1 in favour of the assessee and against the Revenue and question No. 2 is answered in favour of the Revenue

and against the assessee. This reference thus stands disposed of with no order as to costs.

