
(1995) 03 MAD CK 0082
In the Madras High Court
Case No : Tax Case No. 902 of 1982

Lucas TVS Ltd.

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 29-03-1995

Acts Referred:

Income Tax Act, 1961 — Section 28, 35B, 35B(1)
Wealth Tax Act, 1957 — Section 7, 7(1), 7(2)

Citation : (1996) 217 ITR 382

Hon'ble Judges : S.M. Ali Mohamed, J; Mishra, J

Bench : Division Bench

Advocate : K.M.L. Majele, for the Appellant; Deokinandan, for the Respondent

Judgement

Mishra, J.—Two questions out of the three referred to us, namely, whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the surtax payable is not an allowable deduction and whether the Tribunal was right in holding that the interest on belated payment of surtax is not an allowable deduction, it is conceded, stood answered in terms of the judgment of this Court in the case of Sundaram Industries Ltd. Vs. Commissioner of Income Tax, . The third question, "Whether the Tribunal was right in holding that the weighted deduction under s. 35B of the IT Act, 1961, on inspection agency fee, warrants claim relating to export, interest on export packing credit paid to the SBI are not available ? ", needs, however, determination.

2. The assessee is a private limited company and is engaged in the manufacture of auto electrical equipment. It filed a return for the asst. yr. 1976-77 and besides other claims, made a claim for weighted deduction under s. 35B of the IT Act, 1961 (for short, "the Act"), on items including inspection agency and interest on export banking credit paid to the SBI. In respect of the above, the ITO held against the assessee. The CIT(A) upheld the ITO's order. The Tribunal has affirmed the CIT's order and stated regarding the third question that the assessee undertakes to produce, at the hearing of the present reference, the

requisite number of certified copies of the Tribunal's statement of the case, dt. 26th Sept., 1981, in R. A. Nos. 35 and 37/ (Mad) of 1981 in ITA Nos. 1564 and 1673/ (Mad) of 1979. We are given to understand that the reasons for rejecting the assessee's claims as respects the inspection agency fee and interest on export packing credit paid to the SBI are stated in the said order and the Tribunal has only adopted the reasonings in the said order by the above statement. The assessee, however, has not complied with the said direction and we do not have before us the reasons assigned by the Tribunal for rejecting the assessee's claims in respect of the said two items. It is not unusual for any Court or the Tribunal to deliver a considered judgment in one case and, in similar cases coming before it, to make a summary order that for the reasons stated in its order in the other case, it has decided the matter against one or the other party to the proceedings. We, however, cannot approve of the same method being adopted in drawing up the statement of the case, as the statement of the case is one which brings to the notice of the Court the relevant facts and the findings on facts and thus, gives to it a fair idea to know, whether the questions referred to it have actually arisen, whether any reframing of the questions is necessary and whether besides the questions referred to it, there is some other question which ought to be answered. The Tribunal, in the instant case, has gone beyond the limitations upon its jurisdiction and seriously deflected the course of justice by not making available all the relevant facts in the statement of the case. The assessee, in any case, has acted in a most irresponsible manner and has not complied with the direction of the Tribunal. It has chosen to leave the Court in the dark. We do not know if it has thought that disclosure of all the facts to the Court shall go against its interest. In any case, one who does not come with clean hands and one who suppresses information and facts, deserves the Court's adverse orders. We, however, do not propose to do so in the instant case, since learned counsel for the parties, in spite of the handicaps, have addressed us at length and given to the Court valuable assistance. We expect, however, that in future the Tribunal, while drawing up the statement of the case, shall take more care to provide to the Court full disclosure of facts. Its not doing so may be taken as an injudicious and irresponsible act.

3. This reference has come at the instance of the assessee. The Revenue has maintained that any fee paid to any inspection agency, whether it is an export inspection agency or otherwise or any interest paid on any borrowing, whether it is obtained in the name of export packing credit, is not an expenditure wholly and exclusively falling under any of the items referred to in cl. (b) of sub-s. (1) of s. 35B of the IT Act, 1961 of the Act. Learned counsel for the assessee, on the other hand, has submitted that fees paid to the export inspection agency are for furnishing to a person outside India the technical information for the promotion of the sale of goods manufactured by the assessee and thus referable to item (vi) of sub-s. (1) of s. 35B of the IT Act, 1961 of the Act, and interest on export packing credit paid to the SBI is incidental to the execution of the contract for the supply outside India of goods manufactured by it, falling under item (viii) in

cl. (b) of sub-s. (1) of s. 35B of the IT Act, 1961 of the Act.

4. Sec. 35B(1) of the IT Act, 1961 has contemplated a deduction of a sum equal to one and one-third times the amount of such expenditure incurred during the previous year not being in the nature of capital expenditure or personal expenses of the assessee referred to in cl. (b) to an assessee being a domestic company or a person other than a company who is resident in India, if the expenditure is incurred after the 29th day of February, 1968, whether directly or in association with any other person and in case the expenditure is incurred after the 28th day of February, 1973, by a domestic company, being a company in which the public are substantially interested, a deduction of a sum equal to one and one-half times. Sec. 35B was inserted in the IT Act, 1961, by s. 5 of the Finance Act, 1968, w. e. f. 1st April, 1968. It was a new provision altogether. The expenditure referred to in cl. (a) of sub-s. (1) of s. 35B of the IT Act, 1961, thus, was limited by cl. (b) thereof to items as under :

"The expenditure referred to in cl. (a) is that incurred wholly and exclusively on - (i) advertisement or publicity outside India in respect of the goods, services or facilities which the assessee deals in or provides in the course of his business;

(ii) obtaining information regarding markets outside India for such goods, services or facilities;

(iii) distribution, supply or provision outside India of such goods, services or facilities;

(iv) maintenance outside India of a branch, office or agency for the promotion of the sale outside India of such goods, services or facilities;

(v) preparation and submission of tenders for the supply or provision outside India of such goods, services or facilities, and activities incidental thereto;

(vi) furnishing to a person outside India samples or technical information for the promotion of the sale of such goods, services or facilities;

(vii) travelling outside India for the promotion of the sale outside India of such goods, services or facilities, including travelling outward from, and return to, India;

(viii) performance of services outside India in connection with, or incidental to, the execution of any contract for the supply outside India of such goods, services or facilities; and

(ix) such other activities for the promotion of the sale outside India of such goods, services or facilities, as may be prescribed."

Certain amendments were made in the course of time, to the above. Some Explanations were added thereto including the amendment to bring out the intention underlined therein. Nothing, however, was done to prescribe such other activities for the promotion of sale outside India of such goods, services or

facilities for weighted deductions until rules were framed and enforced w. e. f. 1st Aug., 1981. Rule 6AA inserted by the IT (Eighth Amendment) Rules, 1981, provided as follows :

"For the purposes of sub-cl. (ix) of cl. (b) of sub-s. (1) of s. 35B of the IT Act, 1961, other activities for the promotion of the sale outside India of the goods, services or facilities which the assessee deals in or provides in the course of his business shall be as follows, namely : (a) conducting of pre-investment surveys or the preparation of feasibility studies or project reports :

Provided that the pre-investment surveys are conducted or the feasibility studies are made or the project reports are prepared on the request in writing made by the Central Govt. or a foreign party to whom such goods, services or facilities are likely to be sold or provided by the assessee;

(b) maintenance outside India of a warehouse for the promotion of the sale outside India of such goods;

(c) maintenance of a laboratory or other facilities for quality control or inspection of such goods :

Provided that in a case where only part of the sales is made outside India, the amount of expenditure incurred on the maintenance of such laboratory or other facilities which shall qualify for deduction under cl. (a) of sub-s. (1) of s. 35B of the IT Act, 1961 shall not exceed the amount which bears the same proportion as the value of the turnover in respect of such exports bears to the turnover of the business in respect of which the laboratory or other facilities are maintained;

(d) purchase of foreign trade periodicals or journals related to the business of the assessee;

(e) litigation outside India for the purposes of the protection of the business interests of the assessee or of trading activities relating to the goods, services or facilities which the assessee deals in or provides in the course of his business."

5. The assessee has claimed deduction of interest paid to the SBI on the money borrowed by it from an account called export packing credit account. Learned counsel has stated that the credit facility, which the assessee availed of was only for the promotion of export of goods manufactured in India and it was for the performance of service and it was incidental to the execution of the contract for the supply of goods outside India. He has placed reliance on a judgment of the Madhya Pradesh High Court in the case of Commissioner of Income Tax Vs. Vippy Solvex Product Private Limited, in support of his contention and drawn our attention to the observation in the said judgment, which is as follows :

"This section provides a deduction of a sum equal to one-third of the amount of such expenditure incurred during the previous year, and sub-cl. (viii) of sub-s. (1) (b) of this section provides that such expenditure, if it is incurred for the purposes indicated in the sub-clause, the assessee will be entitled to the

advantage of this section. Sub-cl. (viii) talks of performance of services outside India in connection with, or incidental to, the execution of any contract for the supply outside India of such goods, services or facilities. This, therefore, contemplates that expenditure incurred in connection with the services rendered outside India or expenditure incurred in connection with or incidental to the execution of any contract for the supply outside India of such goods will be covered under this section. The findings of fact arrived at by the Tribunal on the basis of the certificate issued by the bank clearly show that all these credits in this account were given for purchase of raw material and this credit is only given when the contract for supply of goods to the foreign parties is shown and, therefore, these findings of fact clearly indicate that this expenditure was incurred in connection with the execution of any contract for supply outside India. It is significant that even incidental expenditure will be covered under this clause as the language shows if the expenditure is in connection with or incidental to the execution of the contract. In this view of the matter, therefore, on the findings of fact arrived at by the learned Tribunal, it appears that the view taken by the Tribunal is correct."

6. Learned counsel for the Revenue, however, has drawn our attention to a judgment of the Calcutta High Court in the case of BROOKE BOND INDIA LTD. Vs. COMMISSIONER OF Income Tax., and contended that item (viii) is attracted to expenditure on performance of services outside India and the rest of this provision indicates that not any or every service outside India would qualify for weighted deduction but only such expenditure as has been incurred for "performance of services outside India in connection with, or incidental to, the execution of any contract for the supply outside India of such goods, services or facilities". He has submitted on the strength of this judgment that in order to be eligible to weighted deduction on the export markets development allowance, it is required to be established by the assessee that the expenditure for which such deduction was being claimed had been incurred wholly and exclusively for the specified purposes. The Calcutta High Court has distinguished the judgment of the Madhya Pradesh High Court in the case of Vippy Solvex Product Pvt. Ltd. (supra) in these words :

"The Madhya Pradesh High Court was of the view that the findings of the Tribunal clearly indicated that the expenditure was incurred in connection with the execution of a contract for the supply of goods outside India. Therefore, the assessee was entitled to weighted deduction of Rs. 3,65,875 paid to the bank under s. 35B of the IT Act, 1961(1) (b) (viii) of the Act. No argument was advanced before the Madhya Pradesh High Court about the question whether it was necessary to establish that the expenditure must be on performance of services outside India. The only basis on which the case was disposed of was that the expenditure was in connection with, or incidental to, the execution of the contract.

Sub-cl. (viii) of s. 35B(1)(b) of the IT Act, 1961 does not allow all expenditure

incurred wholly and exclusively in connection with, or incidental to, the execution of any contract for supply of goods, services and facilities outside India. The allowance is restricted to expenditure which has been incurred wholly and exclusively on "performance of services outside India" when it is found that such services were "in connection with, or incidental to, the execution of any contract for the supply outside India of such goods, services or facilities".

The Calcutta High Court has rejected the argument advanced on behalf of the assessee. What was needed to be seen was, whether the expenditure was incidental to the execution of any contract for the supply outside India of such goods, services or facilities and any expenditure incurred for this purpose would have to be allowed. The Calcutta High Court has stated the law categorically that the allowance under this item of cl. (b) of s. 35B(1) of the IT Act, 1961 is restricted to expenditure which has been incurred wholly and exclusively on performance of service or services outside India, when it is found that such services were in connection with, or incidental to, the execution of any contract for the supply outside India of such goods, services or facilities. He has further drawn our attention to a judgment of the Gujarat High Court in the case of *Isabgul Export Corpn. vs. CIT* (1994) 205 ITR 227, which has considered whether the expenditure incurred on payment of interest to the bank would fall under any of the items of s. 35B(1) of the IT Act, 1961 of the Act and held as follows :

"So far as expenditure of Rs. 88,855 incurred for payment of interest and bank charges is concerned, it does not fall under any of the sub-clauses of cl. (b) of s. 35B(1) of the IT Act, 1961. The assessee would be entitled to weighted deduction under s. 35B(1)(b) of the IT Act, 1961 only if the expenditure is of the nature referred to in cl. (b) of s. 35B(1). The Tribunal was, therefore, right in holding that the said expenditure also did not qualify for weighted deduction under s. 35B of the IT Act, 1961."

7. The Gujarat High Court has again taken the same view in the case of *Testeels Ltd. Vs. Commissioner of Income Tax*, as follows :

"It is clear that, in order to fall under sub-cl. (viii), the expenditure has to be incurred for performance of services outside India and such performance of services outside India has to be in connection with, or incidental to, the execution of any contract for the supply outside India of goods, services or facilities. Weighted deduction under s. 35B(1)(a) is an incentive for export. Therefore, expenditure in respect of which weighted deduction is allowed has to be in connection with or incidental to the execution of any contract for the supply outside India of goods, services or facilities. But, so far as sub-cl. (viii) is concerned, as pointed out above, it deals with expenditure which is incurred in performance of services outside India. However, performance of services outside India has to be in connection with or incidental to the execution of any contract for the supply outside India of such goods, services or facilities. As pointed out above, provision for weighted deduction is made to give incentive to export. If no

services are performed outside India in connection with or incidental to the execution of any contract for the supply outside India of goods, services or facilities, the expenditure incurred for performance of services would not be covered by sub-cl. (viii). In the instant case, the assessee is given facility of credit or loan for buying raw materials for the manufacture of goods which were exported. Firstly, no services are performed in taking credit or loan facility from the bank in order to purchase raw materials for manufacture of goods. Secondly, even if any services were performed, such services are not performed outside India. We fail to see what services are rendered when the assessee takes advantage of credit or loan facility from the bank and pays interest to it. It is the business of the assessee to manufacture goods and sell or export the goods which are manufactured. The activity of export of goods outside India by itself would not be services contemplated by sub-cl. (viii). What is contemplated by sub-cl. (viii) is performance of services outside India in connection with or incidental to the execution of any contract for the supply outside India of such goods, services, or facilities. What the assessee has done is to enter into a contract with a foreign buyer for supply of goods outside India. That is part of the business of the assessee and supply of goods to the foreign buyer by exporting them outside India would not amount to rendering of any services. Services performance of which is contemplated by sub-cl. (viii) have to be rendered outside India. Purchase of raw materials from the credit or loan facility given by the bank to the assessee was part of the business of the assessee and it was from these raw materials that it manufactured goods which it exported in execution of the contract. In our opinion, the assessee has not rendered or performed any services outside India as contemplated by sub-cl. (viii) and, therefore, interest paid by it to the bank on the credit or loan facility given to it would not be covered by sub-cl. (viii) and it would not, therefore, be eligible for weighted deduction." The judgment of the Madhya Pradesh High Court is distinguished by the Gujarat High Court in these words :

"With respect, we are unable to agree with the view taken by the Division Bench of the Madhya Pradesh High Court. It is not correct to say that sub-cl. (viii) contemplates that expenditure incurred in connection with the services rendered outside India or expenditure incurred in connection with or incidental to the execution of any contract for supply outside India of such goods will be covered under this section. In our opinion, the correct position is that sub-cl. (viii) contemplates that expenditure incurred in connection with performance of services rendered outside India in connection with or incidental to the execution of any contract for supply outside India of goods, services or facilities would be covered by sub-cl. (viii). If the view taken by the Division Bench of the Madhya Pradesh High Court that expenditure incurred in connection with or incidental to the execution of any contract for supply outside India of goods, services or facilities would be covered by sub-cl. (viii) is correct, then the remaining sub-clauses would be rendered nugatory." 8. We do not propose to add to the above any other decision, as we have found that there are good reasons to reject the

assessee's claim for deduction under s. 35B(1)(b)(viii) on interest in respect of packing credit paid to the SBI for the obvious reason, that any contemplation of sale of goods, services or facilities will have connection with the manufacturing or processing of goods. Manufacturing or processing will require raw materials as inputs. Any expenditure on manufacturing of goods or processing of goods, however, cannot be in performance of services outside India in connection with, or incidental to, the execution of any contract for the supply outside India of such goods, services or facilities, which has to be different and separate from the processing and manufacturing of goods. Raw materials for the processing or manufacturing of the goods cannot be directly linked with export including packing materials because packing is part of the manufacturing process. Any borrowing, thus, for the purchase of raw materials including the packing materials is an expenditure incurred in the course of or before the manufacturing or processing of goods. It will not fall under item (viii) of cl. (b) of sub-s. (1) of s. 35B of the IT Act, 1961 of the Act. Furnishing to a person outside India samples of goods, services or facilities, for the promotion of sale can be by delivery of samples to a person outside India or by delivering to a person in India for its delivery in turn to the purchaser outside India or only technical information to him. Furnishing of technical information to a person outside India can be achieved by supply of the relevant literature of specification and scientific data. "To inform" is to deliver about everything concerning a fact, that is, the thing, the status of the thing, the association of the thing with another thing, etc. "Information" is imparting of knowledge about a thing or a substance or a fact to any other person. Since in item (vi) above, "information" is qualified by the word "technical" and the performance is specified by a qualifying expression "for the promotion of the sale", it is clear that the assessee can claim deduction for furnishing to the buyer information in respect of the technical nature or character of the goods, services or facilities. Such information can be furnished to the buyer by permitting him to have inspection of the goods. The buyer can be represented by an agent or can depend upon any agency in India, provided such agency has some authority from the buyer or by law or sanction from the licensing authorities in the country. A Bench of the Calcutta High Court in the case of Union Carbide India Ltd. Vs. Commissioner of Income Tax, has considered the question whether the expenses on account of export agency inspection fee are covered by s. 35B of the IT Act, 1961 of the Act and are entitled to weighted deduction. The material facts before the Court were as follows : "Union Carbide (India) Ltd., the assessee, was assessed to Income Tax in the asst. yr. 1978-79, the accounting year ending on 25th Dec., 1977. In its assessment, the assessee claimed weighted deduction under s. 35B of the IT Act, 1961 of the IT Act, 1961, in respect of export inspection agency fees paid on account of export of frozen shrimps. The ITO disallowed the same.

Being aggrieved, the assessee preferred an appeal to the CIT(A). It was contended before the CIT(A) that fees in respect of the export agency inspection were paid for the purpose of obtaining a certificate from the agency as to the

quality of the goods. It was contended that the certificate amounted to technical information on the quality of the products sought to be exported and the production of such certificate was an essential condition for the saleability of the goods in a foreign country. It was contended that the assessee was entitled to weighted deduction on account of export markets development allowance in respect of the said expenditure. The CIT(A) accepted the contentions of the assessee and allowed weighted deduction as claimed holding that the expenditure was wholly and exclusively incurred for certification of the quality of the goods which was an essential condition of export. Being aggrieved, the Revenue went up on further appeal before the Tribunal. The Tribunal accepted the case of the assessee, that unless the said certificates were obtained from the export agency inspection authorities, it would not be possible for the assessee to export its goods. The assessee also produced before the Tribunal a Gazette of India notification dt. 6th March, 1965, which prohibited export of fish and its products, unless accompanied by such certificate. The Tribunal also accepted the contentions of the assessee that the certificate furnished technical information for promotion of sales of the assessee's goods outside India and that the expenditure to obtain such certificate was incurred directly for the export of goods overseas. The contentions of the Revenue to the contrary were rejected."

After referring to the conclusion of the Tribunal that obtaining certificate from export agency was a necessary requirement for the export of the goods and referring to cl. (vi) of s. 35B(1)(b) of the Act, the Calcutta High Court has said :

"..... we are not inclined to interfere with the decision of the Tribunal and we answer the question in the affirmative and in favour of the assessee."

9. The question has fallen for the decision by the Andhra Pradesh High Court in the case of Commissioner of Income Tax Vs. Navabharat Enterprises (P.) Ltd., . The question before the Andhra Pradesh High Court was, whether the money expended on obtaining the Agmark, qualified for deduction under s. 35B(1)(b) (vi) of the Act. After referring to the judgment of the Calcutta High Court in Union Carbide India Ltd.'s case (supra), and taking notice of the legislative intendment, the Court has observed :

"We did not find any averment either in the order of the AAC or the Tribunal or the statement of the case that the Agmark is wholly and exclusively necessary for the purpose of submitting technical information to the foreign buyers for the promotion of the sale of goods (tobacco) of the company. It is also not the case that the certification by the Indian Standards Institution as an Agmark is a condition precedent to export of tobacco or a term of the contract. The decision in Union Carbide India Ltd. Vs. Commissioner of Income Tax, is of little assistance to the company. Therein, the facts were that obtaining a certificate from the export agency is necessary. Therefore, inspection has got to be made by the certifying officer regarding the quality of the goods. It was contended that it was technical information on the quality of the products for export. Therefore, weighted deduction has to be granted. But, in this case, as stated earlier, it is not

the case of the company nor any material has been placed nor a finding was recorded either by the AAC or the Tribunal in that regard. Equally, with regard to the alleged export licence fees and inspection charges, no material has been placed on record and nothing of it has been brought to our notice from record. Equally, with regard to items Nos. (5) and (6), viz., subscription to export promotion councils and trade associations and translation charges, no material has been placed that they are of any technical information required to be furnished by the company to foreign buyers for promotion of the sale of the goods of the company. Therefore, none of the items would be eligible for weighted deduction as sub-cl. (ii), (vi) and (vii) of sub-s. (1) (b) of s. 35B of the IT Act, 1961 are not attracted. Considered from this perspective, the tribunals below erred in law in allowing the above weighted deduction from the chargeable income."

10. As we have noticed earlier, the expression "furnishing to a person outside India samples or technical information for the promotion of the sale of such goods, services or facilities" can be given a liberal or wider meaning depending upon the perception of the scheme of the law. It is the assessee's choice to decide what technical information should be furnished to a person outside India for the promotion of the sale of goods and what should be the method adopted by him. He may decide to create in favour of his goods, opinion of the people who are known and who enjoy the reputation, that they will not recommend any undeserving person or goods. He may legitimately suggest that he had the services of such persons including any agency and forward their opinion or information to a person outside India. He is entitled to deduction under s. 35B(1) (b)(vi) of the Act. It will be difficult in such a situation to substitute for the assessee's decision of interest on trade by the Revenue's opinion or the opinion of the Court. The requirement is, furnishing of technical information to a person outside India for promotion of the sale. The assessee has taken the decision that certain technical information is necessary and he has engaged accordingly any person or agency. The Revenue in such a situation cannot say that the services of such person or agency were not necessary for the supply of technical information to a buyer outside India. It is indeed difficult to perceive why any seller will need any export agency's inspection, before the goods are exported or there is any contract for the sale of goods, unless he feels it necessary to do so or at least thinks, it shall be helpful in promoting the sale of goods, services or facilities, abroad. The judgment of the Calcutta High Court in the case of Union Carbide (*supra*) has gone by the logic that the concerned authorities were satisfied that the expenditure upon the report of the agency concerned for the promotion of export was necessary. It has, however, not said what may be the basis or what can be the basis or what should be the basis for holding that the inspection and report by any expert agency or person is necessary. The Andhra Pradesh High Court in the case of Navabharat Enterprises (P) Ltd. (*supra*) has accepted that in case it is necessary, it may qualify for deduction. But, this judgment also is silent, when and how the Revenue authorities will find that the

expenditure on the inspection and report of the agency or any other person was/ is necessary. Only one test appears to us to be reasonable and that is, whether the expenditure is only for furnishing to a person outside India technical information for the promotion of the sale of goods, services or facilities. As in the case of Agmark, which the Andhra Pradesh High Court considered, if the mark is not confined for the promotion of sale to a person outside India, but is also for satisfying the buyers in India about the quality of the goods sold, it is obviously not a necessary information for item (vi) of cl. (b) of sub-s. (1) of s. 35B of the IT Act, 1961 of the Act.

11. Learned counsel for the Revenue has brought to our notice and we see some relevance of it in understanding the true effect of item (vi) of cl. (b) of sub-s. (1) of s. 35B of the IT Act, 1961 of the Act. Rule 6AA of the IT Rules, 1962, has, for the first time, introduced conducting of pre-investment surveys or the preparation of feasibility studies or project reports, provided that pre-investment surveys were conducted or feasibility studies were made or the project reports were prepared on the request in writing made by the Central Govt. or a foreign party to whom such goods, services or facilities were likely to be sold or provided by the assessee. If the pre-investment surveys or the preparation of feasibility studies or project reports were not included in the technical information for the promotion of sale, the assessee could not take advantage of pre-investment surveys or preparation of feasibility studies or project reports for the promotion of sale of his goods, services or facilities by furnishing such reports to a person outside India. The rule for the first time extended this as an item of deduction, provided such surveys, feasibility studies or project reports were done or prepared on the request in writing made by the Central Govt. or a foreign party to whom such goods, services or facilities were likely to be sold or provided by the assessee. The legislative intent to promote exports and give deductions on expenditure incurred wholly or exclusively for export markets development on items specified in cl. (b) of s. 35B(1) was confined to expenses wholly and exclusively referred to in cl. (b), such as advertisement or publicity outside India in respect of the goods, services or facilities, obtaining information regarding the markets outside India, distribution, supply of provision outside India, of such goods, services or facilities, maintenance outside India of a branch, office or agency for the promotion of sale, etc., including furnishing to a person outside India samples or technical information for the promotion of sale of such goods, services or facilities. Any expenditure falling outside the items referred to in cl. (b) was/is not includible for deduction under cl. (a) of s. 35B(1) of the Act. When the legislature has chosen to further restrict, it has used such expressions and in particular mentioned in item (iii) of cl. (b), distribution, supply or provision outside India of such goods, services or facilities, not being an expenditure incurred in India in connection therewith or expenditure wherever incurred... Since item (vi) does not have any inhibition as in item (iii), the expenditure within India on furnishing to a person outside India samples or technical information for the promotion of sale of goods, services or facilities could/can

qualify for deduction thereunder.

Since the words "samples" and "technical information" in this item of cl. (b) of s. 35B(1) of the Act were/are not defined, they must receive the ordinary meaning and particularly the meaning which the business world gives to them. The ordinary meaning of "information" is wide enough to include the technical information about the quality, specification, etc., of the goods, services and facilities. The assessee may need technical verification and reports on the quality and specification of the goods by experts including the export agency as it may have the necessity of furnishing the same to the buyer outside India. It appears to us, thus, that neither the Revenue nor the Court can read in s. 35B(1)(b)(vi) words to restrict the expenditure on obtaining technical information for furnishing to a person outside India for the promotion of sale of goods, services or facilities and can hold that it is not includible in the weighted deduction, since it is not shown that it is incurred wholly and exclusively for the purpose of furnishing to a person outside India. We find that the Calcutta High Court in the case of Union Carbide India Ltd. (supra) and the Andhra Pradesh High Court in the case of Navabharat Enterprises (P) Ltd. (supra) have adopted the same approach as we have adopted for our conclusions. Learned counsel for the Revenue has, however, argued with some vehemence, that until the rules were introduced by the IT (Eighth Amendment) Rules, 1981, as provided under item (ix) of cl. (b) of sub-s. (1) of s. 35B of the IT Act, 1961 of the Act, the expenditure on pre-investment surveys or the preparation of feasibility studies or project reports was not includible in the amount for deduction as provided under s. 35B(1)(a) of the Act and in fact, according to him, this is an indication that s. 35B(1)(b)(vi) was/is available only in cases of expenditure for furnishing information to a person outside India any technical information which was/is available with the assessee before the export is contemplated or is required under any law, warrant or request in writing made by the Central Govt. or the foreign party to whom such goods, services or facilities were/are likely to be sold or provided by the assessee. A closer look, however, at the provision under r. 6AA reveals that it is in the nature of restriction to what, in certain circumstances, would have been found includible under item (vi) of cl. (b) of sub-s. (1) of s. 35B of the IT Act, 1961 of the Act and thus a clarificatory rule so that claims in respect of pre-investment surveys, preparation of feasibility studies or project reports are kept within the limitations of strict requirements of the law as engrafted under s. 35B(1)(b)(vi) of the Act and in cases where there are doubts whether any pre-investment survey or feasibility study or project report was at all necessary and if it was done, it was for furnishing to a person outside India technical information for the promotion of sale, it is disallowed unless conducted, made or prepared on the request in writing made by the Central Govt. or a foreign party to whom such goods, services or facilities were/are likely to be sold or provided by the assessee.

12. The Calcutta High Court, in the case of Commissioner of Income Tax Vs. Bishnauth Tea Co. Ltd., has noted that by r. 6AA, which was introduced only w. e.

f. 1st Aug., 1981, the other activities as mentioned in item (ix) of s. 35B(1)(b) of the Act had/have been prescribed and that this could not/cannot have any retrospective operation in respect of the asst. yr. 1980-81, although the assessment for the assessment year in question was completed after r. 6AA came into force. In that case (which the Calcutta High Court considered), the Tribunal was of the view that since the rule came into force w. e. f. 1st Aug., 1981, and the assessment was completed on 11th Sept., 1984, the ITO should have examined the alternative contention regarding the allowability of the claim of the assessee under s. 35B(1)(b)(ix) of the Act and said :

"The activities which would come within the purview of sub-cl. (ix) are such activities which are not enunciated in sub-cl. (i) to (viii) of s. 35B(1)(b). If the contention is accepted, it will create an anomaly. If an assessment was completed on 2nd Aug., 1981, the assessee would get the benefit of the rule whereas, if another assessment was completed on 31st July, 1981, although for the same assessment year, that assessee would be denied the benefit. This cannot be the intention of the legislature. Rule 6AA has not been given any retrospective effect by implication or otherwise. Dr. Pal has not seriously contended that he supports the views of the Tribunal that, inasmuch as the assessment was completed on 11th Sept., 1984, after the introduction of r. 6AA, the benefit of sub-cl. (ix) would be available to the assessee, and that such a view is sustainable."

13. With respect, we think, this aspect needed elucidation and the Calcutta High Court gave no clear view on this. Commencement of a taxing statute if it is not procedural and is not retrospective, should ordinarily be the commencement of the financial year, that is, the assessment year. If r. 6AA was/is given effect to from 1st Aug., 1981, the Calcutta High Court has rightly noticed, "this cannot be the intention of the legislature". As a general rule, laws which fix duties, establish rights and responsibilities among and for persons, natural or otherwise, are "substantive laws" in character, while those which merely prescribe the manner in which such rights and responsibilities may be exercised and enforced in a Court are "procedural laws". In *Commissioner of Wealth Tax, Meerut Vs. Sharvan Kumar Swarup and Sons*, the Supreme Court has quoted a passage from Salmond's *Jurisprudence* (Twelfth edition, page 461), which points out the distinction between "substantive law" and "law of procedure" in these words :

"What, then, is the true nature of the distinction ? The law of procedure may be defined as that branch of the law which governs the process of litigation. It is the law of actions - *jus quod ad actiones pertinet* - using the term action in a wide sense to include all legal proceedings, civil or criminal. All the residue is substantive law, and relates, not to the process of litigation, but to its purposes and subject-matter. Substantive law is concerned with the ends which the administration of justice seeks; procedural law deals with the means and instruments by which those ends are to be attained. The latter regulates the conduct and relations of Courts and litigants in respect of the litigation itself; the

former determines their conduct and relations in respect of the matters litigated."

".... What facts constitute a wrong is determined by the substantive law; what facts constitute proof of a wrong is a question of procedure...." "So far as the administration of justice is concerned with the application of remedies to violated rights, we may say that the substantive law defines the remedy and the right, while the law of procedure defines the modes and conditions of the application of the one to the other..." "The division of law into two broad categories of substantive law and procedural law is well-known. Broadly stated, whereas substantive law defines and provides for rights, duties and liabilities, it is the function of the procedural law to deal with the application of substantive law to particular cases and it goes without saying that the law of evidence is a part of the law of procedure".

14. This judgment has also quoted from Halsbury's Laws of England (Fourth edition, volume 23, para. 29) referring to the machinery provisions, which reads as follows :

"It is important to distinguish between charging provisions, which impose the charge to tax, and machinery provisions, which provide the machinery for the quantification of the charge and the levying and collection of the tax in respect of the charge so imposed. Machinery provisions do not impose a charge or extend or restrict a charge elsewhere clearly imposed."

The Supreme Court in this judgment has quoted with approval, the observations in the minority judgment in *Kesoram Industries and Cotton Mills Ltd. Vs. Commissioner of Wealth Tax, (Central) Calcutta*, . The said judgment considered the effect of s. 7(1) of the WT Act. Sec. 7 of the WT Act provided/provides :

" (1) Subject to any rules made in this behalf, the value of any asset, other than cash, for the purposes of this Act, shall be estimated to be the price which in the opinion of the WTO, it would fetch if sold in the open market on the valuation date.

(2) Notwithstanding anything contained in sub-s. (1), -

(a) Where the assessee is carrying on a business for which accounts are maintained by him regularly, the WTO may, instead of determining separately the value of each asset held by the assessee in such business, determine the net value of the assets of the business as a whole having regard to the balance-sheet of such business as on the valuation date and making such adjustments therein as the circumstances of the case may require....

(b) where the assessee carrying on the business is a company not resident in India and a computation in accordance with cl. (a) cannot be made..."

The minority opinion reads as follows :

"But the power conferred upon the tax officer by s. 7(2) is to arrive at a valuation of the assets, and not to arrive at the net wealth of the assessee. Sec. 7(2) merely provides machinery in certain special cases for valuation of assets,

and it is from the aggregate valuation of assets that the net wealth chargeable to tax may be ascertained. The power conferred upon the tax officer to make adjustments as the circumstances of the case may require is also for the purpose of arriving at the true value of the assets of the business.... This is an artificial rule adopted with a view to avoid investigation of a mass of evidence which it would be difficult to secure or, if secured, may require prolonged investigation....."

15. In *Murarilal Mahabir Prasad and Others Vs. Shri B.R. Vad and Others*, , it has been pointed out that procedural law, generally speaking, is applicable to pending cases. No suitor can be said to have a vested right in procedure, and that it must, however, be noted that a provision can be partly substantive and partly procedural. It is not difficult to visualise if the extent of s. 35B(1)(b)(vi) is (which has been indicated by us earlier) that the rule has intended to restrict the assessee's claims of weighted deduction of all kinds of expenditure in the name of furnishing to a person outside India technical information in the sense that the only guideline available for the assessment of any such claim was the good conscience of the assessee and the judicial conscience of the assessing authorities including the appellate authorities, the rule is partly procedural and partly substantive. The nature of the substantive part, however, when examined, reveals, as we have noticed earlier, taking out of the fold, the expenditure on furnishing to a person outside India technical information for the promotion of the sale, such expenses which the assessee made at his whim in conducting a pre-investment survey or the preparation of feasibility studies or project reports. The legislature had/has clarified that the expenditure on pre-investment surveys or feasibility studies or project reports could/can be entertained only when done or prepared on the request in writing made by the Central Govt. or a foreign party to whom such goods, services or facilities were/are likely to be sold or provided by the assessee.

16. The presumption against retrospective operation of a fiscal statute is not applicable to declaratory statutes. In *Keshavlal Jethalal Shah Vs. Mohanlal Bhagwandas and Another*, , the Supreme Court has pointed out that an explanatory Act is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous Act. In *Shri Chaman Singh and Another Vs. Srimathi Jaikaur*, , the Supreme Court considered the amendment to the Punjab Pre-emption Act, which introduced step-daughter of a widow besides the daughters and others as a person entitled to exercise her right of pre-emption to the property received by the widow from her deceased husband. The Supreme Court noted that step-daughter was there even before the amendment and the amendment Act at any rate removed whatever doubts existed and thus, was merely of a clarificatory or declaratory nature. The Court said in unequivocal terms that if the statute is curative or merely declaratory of the previous law, retrospective operation is generally intended. In *M/s. Punjab Traders and others Vs. State of Punjab Traders and others*, , the Supreme Court has noted that the main object of the amendment Act was to clarify the previous Act, that is E. P.

Molasses (Control) Act, as according to it, the law before the amendment applied in equal measure to a khandsari unit as it applied to any other sugar factory. According to the Supreme Court, the definition of "sugar" in the original Act included a khandsari unit.

The Court observed that the amendment Act was merely clarificatory and it was always well understood in trade that khandsari sugar was also sugar and that any reference to sugar, in the absence of specific exclusion or qualification, was capable of equal application to sugar of all kinds including khandsari. Even if it is true that persons who deal with the statute understood its provisions in a restricted sense, such mistaken construction of the statute did not bind the Court, so as to prevent it from giving its true construction.

17. We have prospected a little further than the Calcutta and Andhra Pradesh High Courts and found that in so far as the payment to the export inspection agency is concerned, if it was incurred wholly and exclusively for the purpose of furnishing to a person outside India technical information for the promotion of sale, it may qualify under s. 35B(1)(b)(vi) of the Act. The Tribunal, however, has not furnished the relevant statement of facts. We would have returned the reference without answering and asked the Tribunal to furnish the necessary statement of facts without entering into the merits of the controversy. Since we have chosen to enter into the merits of the controversy and recorded our opinion on the principles of law, we have no other way to dispose of the instant proceeding except to remit it back to the Tribunal to consider strictly in accordance with law whether the export inspection agency provided to the seller and through him to the buyer or directly to the buyer any technical information about the goods, which goods the assessee exported in due course. Since, at the relevant time, the rules were not operative but there is an implied declaration therein that there could be pre-investment surveys, etc., for the goods which were/are exported in due course, the Tribunal shall consider whether the services of the agency concerned were requisitioned by the assessee for the export promotion and not for any other purpose.

18. To conclude, the first two questions are answered as in Sundaram industries" case (supra) and the third question is answered against the assessee in so far as the interest on export banking credit paid to the SBI is concerned and the case is remitted back to the Tribunal for fresh determination in the light of the opinion as above in so far as the expenditure on export inspection agency fees is concerned. The reference is disposed of accordingly. There will be no order as to costs.