
(2019) 09 CAL CK 0024

In the Calcutta High Court

Case No : Income Tax Appeal (ITA) No. 135 Of 1995

Pieco Electronics & Electricals Ltd

APPELLANT

Vs

C.I.T W.B. – I, Cal

RESPONDENT

Date of Decision : 06-09-2019

Acts Referred:

Income Tax Act, 1961 — Section 16, 32(1)(iii), 32(i)(iii), 35B(i)(b)(iv), 35B(1)(iv),
36(1)(ia), 40A(5), 40(6)
Income Tax Rules, 1962 — Rule 5

Citation : (2019) 09 CAL CK 0024

Hon'ble Judges : I. P. Mukerji, J;Md. Nizamuddin, J

Bench : Division Bench

Advocate : J. P. Khaitan, Sanjay Bhowmick, A. K. Dey. P. K. Bhowmick

Final Decision : Disposed Off

Judgement

I.P. Mukerji, J

This is a reference application under Section 256(1) of the Income Tax Act, 1961. In the statement of the case drawn up by the Income Tax appellate tribunal, further to the direction of this Court, ten questions of law were framed by it. Mr. J. P. Khaitan, learned Senior Advocate appearing for the applicant does not canvas questions 5, 7 and 8. The other questions are set out below:

1. Whether the Tribunal was justified in holding that for the purpose of entitlement to weighed deduction under Section 36 (1) (ii a) of the Income Tax Act, 1961 the income of employees chargeable under the head 'salaries' before allowance of standard deduction under Section 16 of the Act was to be considered?
2. Whether the Tribunal was justified in holding that loss under Section 32 (1) (iii) of the Act was allowable not in the year in which fixed assets were discarded but only in the year in which they were sold?
3. Whether on the facts and in the circumstances the Tribunal was right in

rejecting the assessee's claim that the sum of Rs.4,25,450 having been estimated as the value assets scrapped in the immediately preceding assessment year and added back, should be allowed as deduction from income arising on sale of the said assets in the previous year?

4. Whether, in view of the fact that motor cars were provided the senior employees both for official and personal use, the Tribunal was justified in holding that the entire expenditure on such motor cars was liable to be disallowed under Section 40(6) of the Act?

6. Whether in view of the fact that telephones were provided at the residence of employees both for official and personal use the Tribunal was justified in confirming disallowance under Section 40A(5) of the entire expenditure on telephones amounting to Rs.2,14,690?

9. Whether, on the facts, the Tribunal was right in holding that deduction claimed under Section 35B(1) (iv) of the Act in respect of commission payable outside India amounting to Rs.27,95,058 was not allowable?

10. Whether, the Tribunal was justified in holding that depreciation on moulds used for manufacture of glass was rightly restricted to 10% against 30% claimed by the assessee?

To answer the first question, one has to consider Section 36(1) (iia) of the Income Tax Act, 1961 as prevailing in the assessment year 1983-84. It laid down that the assessee was entitled to deduction amounting to 1 and 1/3rd times the amount of expenditure incurred on the payment of salary for the period of employment before 1st March, 1984 to an employee suffering from physical disabilities mentioned in the sub-section. The proviso is very important. It said that this subsection would not apply to an employee whose income "chargeable under the head" "salaries" exceeded Rs.20,000/-per month.

Now, the question is: what is to be taken as the salary - the gross amount or the net after deduction. The case of the revenue is that it is the gross amount whereas the assessee contends that it is only the net amount as mentioned in Section 16 which is relevant.

Now, if you compare the language employed in Section 36(1)(iia) proviso, it uses the expression "chargeable under the head salaries" while qualifying salary. Section 16 provides for certain deductions to be made to arrive at the salary "chargeable under the head salaries". It is quite plain that the legislature intended to use the phrase "chargeable under the head salaries" for computation of income under Section 36 (1) (iia) in the same way as under Section 16. Therefore, the first question is answered in the negative in favour of the assessee and against the revenue.

The second question concerns Section 32(i)(iii) of the said Act. It lays down that in respect of depreciation of building machinery plant or furniture on which depreciation is claimed and allowed under Clause (i) and which is, inter alia, sold,

discarded etc, in the previous year, not being the year in which it is bought, a deduction is allowed for the amount by which the value of the items falls short of the written down value.

Although in the two cases cited by Mr. Khaitan Arunkumar Mohota (HUF) Vs. First Wealth-tax-Officer reported in 216 ITR 578 and Allied Electronics and Magnetics Ltd. Vs. Deputy Commissioner of Income-Tax reported in 304 ITR 160, being Division Bench judgments of the Bombay and Delhi High Courts respectively there is no clear cut ratio that deduction is allowable on the sale or discarding of the goods and that there need not be sale as held by the tribunal in the impugned order, the line of reasoning adopted by the learned judges in coming to their conclusion, could not have been adopted, unless the premises that sale and discarding of the goods were disjunctive was accepted as a matter of principle.

By my interpretation of this sub-section, the words sold and discarded are disjunctive and denote separate dealing with the above items.

Therefore, in my view, the tribunal made an error of law in coming to the conclusion that "there was no evidence to prove that the items claimed to have been discarded and scrapped were actually sold by the assessee." Therefore, this question is also answered in the negative in favour of the assessee and against the revenue.

As questions 2 and 3 are related the answer to question 3 is also in the negative in favour of the assessee and against the revenue but with the rider that the veracity of the claim of the assessee is to be established.

Questions 4 and 6 relate to interpretation of Section 40A (5) of the said Act which was existing during the financial year in question, that is, 1982-83. We have been shown a very well considered judgment of a full bench of the Kerala High Court Commissioner of Income Tax Vs. Forbes, Ewart and Figgis (P) Ltd. reported in 138 ITR 5. We are also shown, a division bench

judgment of the same high court Periakaramalai Tea and Produce Co. Ltd. Vs. Commissioner of Income Tax reported in 199 ITR 100 following the said full bench judgment. It held that the expenditure incurred on motor cars for the use of employees for business purposes may be apportioned out of the total expenditure incurred for that purpose and deduction claimed of the apportioned amount in accordance with the section. I respectfully follow the said decisions and hold that the appellant was entitled to deduction of the amount spent by them for business purpose subject to the ceiling, if any applicable under the said section.

Therefore, this question is also answered in favour of the assessee and against the revenue.

Question 9 concerns the interpretation of section 35B(i)(b)(iv) of the said Act at the relevant point of time. The question is whether the expenditure claimed was

incurred wholly or exclusively on the maintenance outside India of a branch or agency for the promotion of sale of the subject goods, service or facilities. This sub-section was interpreted by the Supreme Court in *Aravinda Paramila Works Vs. Commissioner of Income Tax* reported in 237 ITR 284. The highest court remarked:

"The expenditure that is referred to therein has to be incurred on the maintenance outside India of a branch, officer or agency for the promotion of sales outside India of the assessee's goods, services or facilities. Therefore, what is requisite is that the assessee should have maintained the branch, officer or agency outside India.....While we think that there is some merit in the observation of the Karnataka High Court that the words "branch, officer or agency" in the clause draw colour from each other and that the word "agency" should, therefore, be interpreted in the light of the words "branch" and "office", it is, in any event, very clear that even if the agency is an agency established not by the assessee but by a third party, the agency must be maintained by the assessee.

In the result, we uphold the view taken by the Karnataka High Court in the judgment and order under appeal and dismiss the appeal with costs."

We think that the learned tribunal has not applied the above legal test in interpreting the section in considering the case of the assessee. This question is answered in the negative in favour of the assessee and against the revenue.

Question 10 is a question of fact. The tribunal has interpreted item no.5 of part III of appendix 1 to Rule 5 of the Income Tax Rules, 1962. Based on this interpretation, the findings of the tribunal were made on the question of fact, whether the moulds in question were used in glass manufacturing concerns except direct fire glass melting furnaces. The impugned order of the tribunal does not determine whether the appellant was a "glass manufacturing concern" and/or whether the manufacturing process involved "direct fire glass melting in furnaces." This determination of fact was essential to come to a finding whether the appellant was entitled to a higher rate of depreciation of 30% on moulds. The reasons given by the tribunal are inadequate. More analysis of the facts and reasons were required. This is a kind of perversity. Therefore, the question is also answered in favour of the assessee and against the revenue.

I clarify that while answering the questions in favour of the assessee, I only hold that the impugned order of the tribunal on these issues was erroneous. I do not hold that the issue itself is answered in favour of the assessee. That would depend on the adjudication by the tribunal on remand, on the basis of my observations above.

In those circumstances, those parts of the impugned order of the tribunal relating to the subject-matters covered by questions 1, 2, 3, 4, 6, 9 and 10 are set aside.

We direct the tribunal to re-determine these issues in accordance with this judgment and order and to pass a fresh order on hearing the parties and by a reasoned order within six months of communication of this order. This reference application is accordingly disposed of.

Certified photocopy of this judgment and order, if applied for, be supplied to the parties upon compliance with all requisite formalities.

I agree,