(2004) 10 AHC CK 0192

Allahabad High Court

Case No: IT Reference No''s. 111 And 112 Of 1985 October 12,2004

Cawnpore Textiles Ltd.	APPELLANT
Vs	
Commissioner of Income Tax	RESPONDENT

Date of Decision: Oct. 12, 2004

Acts Referred:

- Income Tax Act, 1961 - Section 10, 17, 256, 28, 35B

Citation: (2005) 144 TAXMAN 590

Hon'ble Judges: R.K. Agrawal, J; K.N. Oma, J; K.N. Ojha, J

Bench: Full Bench

Advocate: R.S. Agarwal, A.N. Mahajan,, for the appearing parties;

Final Decision: Allowed

Judgement

R.K. Agrawal, J.

In Income Tax Reference No. 111 of 1985 which relates to the assessment years 1975-76 and 1976-77 the Income Tax Appellate Tribunal, Allahabad has referred the following questions of law u/s 256(1) of the Income Tax Act, 1961 (hereinafter referred to as the ''Act for opinion of this Court:

"1. Whether on the facts and in the circumstances of the case, the Income tax Appellate Tribunal was correct in law in holding that depreciation on assets provided to employees of the assessee free of charge required to be included in computing the disallowance u/s 40A(5) of the Income Tax Act, 1961?

2. Whether, on the facts and in the circumstances of the case, the assessee is entitled to weighted deduction u/s 35B of the Income Tax Act, 1961 in respect of expenses incurred on export levy and on carriage of goods and insurance, while on transit?

3. Whether on the facts and in the circumstances of the case, the Income tax Appellate Tribunal was correct in law in holding that the assessee was entitled to

extra shift allowance in regard to machinery added during the year on the basis of the number of days the particular machinery was actually put to use?

4. Whether on the facts and in the circumstances of the case, the cash incentive of Rs. 16,01,547 received by the assessee under the Export Promotion Scheme benefits from the Government represented the income of the assessee taxable within the ambit and scope of the charging provisions of the Income Tax Act, 1961 and was, therefore, rightly included in its total income for the assessment year 1976-77?"

2. Whereas in Income Tax Reference No. 112 of 1985 which relates to the Assessment Years 1977-78 and 1978-79, the Tribunal has referred the following questions of law u/s 256(1) of the Act for opinion of this Court:

" 1. Whether on the facts and in the circumstances of the case, the assessee is entitled to weighted deduction u/s 35B of the Income Tax Act, 1961 in respect of expenses incurred on export levy and on carriage of goods, while on transit?

2. Whether on the facts and in the circumstances of the case, the cash incentive of Rs. 12,26,739 in the assessment year 1977-78andRs. 11,37,356 in the assessment year 1978-79 received by the assessee under the Export Promotion Scheme benefits from the Government represented the income of the assessee taxable within ambit and scope of the charging provisions of the Income Tax Act, 1961 and were, therefore, rightly included in its total income for the assessment years 1977-78 and 1978-79?

3. Whether on the facts and in the circumstances of the case the Income Tax Appellate Tribunal was correct in law in holding that depreciation on assets provided to employees of the assessee free of charge required to be included in computing the disallowance u/s 40A(5) of the Income Tax Act, 196 l?

4. Whether on the facts and in the circumstances of the case the Tribunal was correct in law in holding that the perquisite is the form of rent-free accommodation provided to Shri M.S. Nathan on which no expenditure was actually incurred, could be treated as an expenditure or allowance for the put-poses of disallowance u/s 40A(5) of the Income Tax Act, 1961 for the assessment year 1977-78?

5. Whether on the facts and in the circumstances of the case the Income Tax Appellate Tribunal was correct in law in holding that the expenses on maintenance of accommodation owned by the assessee and provided free of rent to Shri M.S. Nathan could be considered for the purpose of disallowance u/s 40A(5) of the Income Tax Act, 1961 for the assessment year 1977-78?"

3. Briefly stated the facts giving rise to the present Reference are as follows:

The applicant is a Public Limited Company which runs a textile mill at Kanpur. It is also engaged in exporting its goods. In respect of the assessment year 1975-76 the Inspecting Assistant Commissioner (Assessment) included the amount of

depreciation in respect of furniture provided by the applicant to its Managing Director Sri T.N. Sharma while computing disallowance u/s 40A(5) of the Act. In respect of assessment years 1976-77,1977-78 and 1978-79 also he included depreciation on furniture and car while computing disallowance under the aforesaid section in respect of Sri T.N. Sharma and other employees. The claim of the applicant regarding weighted deduction u/s 35B of the Act in respect of its expenses allowing export levy paid to Cotton Textiles Export Promotion Council for carriage of goods from Kanpur to Bombay and other insurance was also rejected on the ground that the expenses were incurred in India and, therefore they were not entitled to weighted deduction u/s 35B(1)(b)(iii) of the Act.

4. For the assessment years 1976-77, 1977-78 and 1978-79 the applicant received Rs. 16,01,547, Rs. 12,26,739 and Rs. 11,37,356 respectively as Export Promotion Scheme benefits. It had credited this amount to its profit and loss account. Before the Inspecting Assistant Commissioner it was claimed that it was not a taxable receipt. The claim was rejected on -the ground that it was not income of any casual nature. During the assessment year 1977-78 the applicant had provided rent-free accommodation to Sri. M.S. Nathan and one of its officers. The Inspecting Assistant Commissioner had included the expenditure of maintenance and repairs of the said accommodation as also certain percentage of the salary towards the expenditure on amenities and benefits for rent-free accommodation being 10 per cent of the salary. in respect of extra-shift allowance, the assessing officer had held that the applicant is entitled for it only in respect of the actual number of days during which the such machinery and plant had worked and not for the period during which the entire plant had worked.

5. In appeal, however, the CIT(A) had deleted the amount included towards the depreciation while computing disallowance u/s 40A(5) of the Act as also availing of rent-free accommodation and maintenance provided by the applicant to its employees.

6. The claim regarding weighted deduction was, however, negatived by the CIT(A). He, however, held that extrashift depreciation had to be calculated on the basis of the number of days for which the concern had worked and not on the basis of the number of days of which the new machinery had worked. The addition regarding benefits received by the applicant towards the Export Promotion Scheme was also upheld.

7. The applicant as also the revenue preferred separate appeals before the Income Tax Appellate Tribunal. The Tribunal has upheld the orders passed by the assessing officer on the question of Cash Incentive under Export Promotion Scheme and weighted deduction. It had, however, reversed the order of the CIT(A) insofar as inclusion of the amount of depreciation on rent-free accommodation and its maintenance while computing disallowance u/s 40A(5) of the Act and extra-shift allowance on new machineries added during the year.

8. Since both the references are at the instance of the same applicant and raise some questions of law which are common for the assessment years 1975-76 to 1978-79 they are being decided by a common judgment.

9. We have heard Sri R.S. Agarwal, learned counsel for the applicant and Sri A.N. Mahajan, learned standing counsel for the revenue.

10. So far as the question of inclusion of the amount of depreciation and value of rent-free accommodation and its maintenance towards perquisite while working out disallowance u/s 40A(5) of the Act is concerned it may be mentioned here that the relevant provision u/s 40A(5)(a) and (b) of the Act reads as follows:

"(5)(a) where the assessee

(i) incurs any expenditure which results directly or indirectly in the payment of any salary to an employee or a former employee, or

(ii) incurs any expenditure which results directly or indirectly in the provision of any perquisite (whether convertible into money or not) to an employee or incurs directly or indirectly any expenditure or is entitled to any allowance in respect of any assets of the assessee used by an employee either wholly or partly for his own purposes or benefit, then, subject to the provisions of clause (b), so much of such expenditure or allowance as is in excess of the limit specified in respect thereof in clause (ce rtiora ri quashing the order dated) shall not be allowed as a deduction:

Provided that where the assessee is a company, so much of the aggregate of

(a) the expenditure and allowance referred to in sub-clauses (1) and (it) of this clause; and

(b) the expenditure and allowance referred to in sub-clauses (1) and (ii) of clause (certiorari quashing the order dated) of section 40, in respect of an employee or a former employee, being a director or a person who has a substantial interest in the company or a relative of the director or of such person, as is in excess of the sum of (one hundred and two thousand rupees) shall in no case be allowed as a deduction.

Provided further that in computing the expenditure referred to in sub-clause (i) or the expenditure or allowance referred to in subclause (ii) of this clause or the aggregate referred to in the foregoing proviso the following shall not be taken into account, namely:

(i) the value of any travel concession or assistance referred to in clause (5) of section 10;

(ii) passage money or the value of any free or concessional passage referred to in sub-clause (i) of clause (6) of section 10;

(iii) any payment referred to in clause (iv) or clause (v) of subsection (1) of section 36;

(iv) any expenditure referred to in clause (ix) of sub-section (1) of section 36.

Explanation 1.The provisions of this sub-section shall apply notwithstanding that any amount not to be allowed under this sub-section is included in the total income of the employee or, as the case may be, the former employee.

Explanation 21n this sub-section,

(a) "salary" has the meaning assigned to it in clause()) read with clause (3) of section 17 subject to the following modifications, namely:

(1) in the said clause (1) the word ''perquisites'' occurring in sub-clause (ii) and the whole of sub-clause (vii) shall be omitted:

(2) in the said clause (3), the reference to "assessee" shall be construed as reference to "employee or former employee" and the references to "his employer or former employee and "an employer or a former employer" shall be construed as references to "the assessee";

(b) "perquisite" means

(i) rent-free accommodation provided to the employee by the assessee;

(ii) any concession in the matter of rent respecting any accommodation provided to the employee by the assessee;

(iii) any benefit or amenity granted or provided free of cost or at concessional rate to the employee by the assessee;

(iv) payment by the assessee of any sum in respect of any obligation which, but for such payment, would have been payable by the employee;

(v) payment by the assessee of any sum, whether directly or through a fund, other than a recognised provident fund or an approved superannuation fund, to effect an assurance on the life of the employee or to effect a contract for an annuity;

(vi) the amount treated as a perquisite under sub-clause (vi) of clause (2) of section 17"

11. From a reading of the aforesaid provisions it will be seen that all expenditure incur-red by the applicant which results directly or indirectly in the provision of any perquisite to an employee or any assets used by air employee is to be treated for computing the value of disallowance and even the rent free accommodation provided to the employee is treated to be a perquisite.

12. In the case Commissioner of Income Tax Vs. Empire Dyeing and Manufacturing Co. Ltd., the Bombay High Court has held that the provision of accommodation to the employee in premises belonging to the company amounted to a perquisite within the meaning of section 40A(5) of the Act. The depreciation on his furniture is to be considered as allowance in respect of the assets of the applicant used by the

employee and, therefore, falls within the purview of section 40A(5)(a)(h) of the Act.

13. In C.W.S. (India) Limited Vs. Commissioner of Income Tax, the Apex Court has held that expression "allowance" in section 40(a)(v) and section 40A(5)(a)(h) of the Act takes in depreciation allowance and the ceiling on expenditure provided under these provisions applied also to depreciation allowance on all assets belong to the employer- assessee used by an employee.

14. In this view of the matter the Tribunal was justified in upholding inclusion of the value of the rent-free accommodation and depreciation allowance while computing disallowance u/s 40A(5) of the Act.

15. So far as the extra shift allowance is concerned, it may be mentioned here that the Apex Court in M/s. South India Viscose Ltd. Vs. Commissioner of Inocme Tax, has held that extra shift allowance has to be calculated on the basis of number of days during which the concern had actually worked double shift or triple shift and the said allowance is not required to be calculated on the basis of the number of days a particular item of machinery or plant had worked double shift or triple shift.

16. In this view of the matter the Tribunal was not justified in restricting allowance of extra shift to the number of days during which the new machinery or plant had actually worked. It was allowable on the basis of the number of days during which the applicant had actually worked double or triple shift.

17. So far as the cash incentive under the Export Promotion Scheme is concerned it may be mentioned here that section 28(iii)(b) of the Act which has been inserted by the Finance Act, 1990 with effect from 1-4-1967 provides that the cash assistance (by whatever name called) received or receivable by any person against exports under any scheme of the Government of India and section 28(iii)(c) provides that any duty of customs or excise repaid or repayable as drawback to any person against exports under the Customs and Central Excise Duties Drawback Rules, 1971 is chargeable to income tax under the head "Profits and gains of businesses or profession."

18. In this view of the matter the cash incentive received by the applicant under the Export Promotion Scheme is clearly chargeable to income tax under the head "Profits and gains of businesses or profession." Thus the Tribunal was justified in upholding the addition.

19. In respect of weighted deduction claimed u/s 35B(iii) of the Act it may be mentioned there that the weighted deduction is allowable only if they are wholly exclusively incurred for any of the purposes mentioned in various sub-clauses of section 35B(1)(b) of the Act.

20. In the case of CIT v. Stepwell Industries Ltd. (1997) 228 ITR 17 11 the Apex Court has laid down the following principles for allowance of weighted deduction u/s 35B of the Act:

"When a claim for weighted deduction is made, it is for the assessee to satisfy the Income Tax Officer that the expenditure falls under any of the sub-clauses of clause (b) of section 35B(1) of the Income Tax Act, 1961. The onus is on the assessee to prove that he is entitled to weighted deduction allowed u/s 35B. In order to get this deduction, the assessee will have to prove that the expenditure was incurred during the previous year wholly and exclusively for the purposes set out in clause (b) of section 35B(I). There cannot be any blanket allowance of the expenditure nor can there be any blanket disallowance. Every case has to be discussed specifically and the expenditure must be found to be of the nature mentioned in any one of the sub-clauses. lf the expenditure does not fall in any of these categories, it cannot be allowed as a deduction. Some of the sub-clauses provide that if the expenditure is incurred in India, it cannot be allowed but in some of the sub-clauses this requirement is not there. In such cases the expenditure may or may not be incurred in India. Every case will have to be examined in the light of the provisions of the sub-clauses and the facts provided by the assessee." (p. 171)

The Apex Court has further held that:

"...The expenditure which qualifies for deduction u/s 35B(1)(b)(iii) will have to be expenditure incurred outside India in connection with distribution, supply or provision outside India of such goods, services or facilities. No deduction u/s 35B can be allowed to the assessee for expenditure incurred in India in connection with sale of goods. There is no dispute that the expenditure was wholly incurred in India..." (p. 172)

21. This court in CIT v. New Light Tannery (1999) UPTC 812 has field that weighted deduction is not permissible in respect of an expenditure incurred in India on insurance '' shipment, freight, dispatch, and clearing and transportation of goods to their destination.

22. The Madras High Court in the case of Hamosons Exports (P) Ltd. v. CIT (1999) 157 CTR 473 has held that weighted deduction is not allowable on air freight charges and insurance charges where such expenditure is incurred in India in view of the express prohibition under sub-section (iii) of section 35B(1)(b) of the Act. The applicant is not entitled for weighted deduction in respect of expenses incurred on export levy and on carriage of goods and insurance while on transit which has been incurred in India.

23. In view of the foregoing discussions our answers to the questions referred to us are as follows:

24. Question No. 1 of ITR No. 111 of 1985 and question No. 3 of ITR No. 112 of 1985 in the affirmative, i.e.,, in favour of the revenue and against the assessee.

25. Question No. 2 of ITR No. 111 of 1985 and question No. 1 of ITR No. 112 of 1985 in the negative ~e., in favour of the revenue and against the assessee.

26. Question No. 3 of ITR No. 111 of 1985 in the negative i.e., in favour of the assessee and against the revenue.

27. QuestionNo. 4 of ITR No. 111 of 1985 and question No. 2 of ITR No. 112 of 1985 in the affirmative i.e., in favour of the revenue and against the assessee.

28. Question Nos. 4 and 5 of ITR No. 112 of 1985 in the affirmative i.e., in favour of the revenue and against the assessee.

29. In view of the divided success the parties shall bear their own costs.