(2008) 165 CTR 218 : (2009) 316 ITR 181

Gujarat High Court

Case No: None

Commissioner of Income Tax		APPELLANT
	Vs	
Office of The Official Liquidator		RESPONDENT

Date of Decision: Feb. 11, 2008

Acts Referred:

- Income Tax Act, 1961 - Section 35B, 35D, 41, 43B

Citation: (2008) 165 CTR 218 : (2009) 316 ITR 181

Hon'ble Judges: Z.K. Saiyed, J; D.A. Mehta, J

Bench: Division Bench

Judgement

D.A. Mehta, J.
The Tribunal, Ahmedabad Bench "A" has referred the following five questions for the opinion of this Court u/s 256(1) of the Income Tax Act, 1961 (hereinafter referred to as the ""Act") at the instance of the Commissioner:

1. Whether the Tribunal is right in law and on facts in deleting the disallowance of Rs. 18,18,429 being the debenture issue expenses, wherein the Commissioner (Appeal) had held that it is of a capital nature covered by Section 35D?

2. Whether the Tribunal is right in law and on facts in allowing the weighted deduction regarding commission paid to Indian agents to the extent of export sales ?

3. Whether the Tribunal is right in law and on facts in deleting the addition of Rs. 6,37,885 made by the way of adjustment entry in the municipal tax expenses account ?

4. Whether the Tribunal is right in law and on facts in allowing deduction of legal expenses of Rs. 10,043 and Rs. 13,500 being expenses attributable to issue of debentures as revenue expenditure ?

5. Whether the Tribunal is right in law and on facts in deleting disallowance of Rs. 1,48,358 made u/s 43B of the Income Tax Act in respect of municipal tax and education cess ?

2. The assessment year is 1983-84, while the relevant account period is year ended on 30-6-1982. The assessee is a limited company running a textile mill with a rubber division.

3. The assessee claimed debenture issue expenses of Rs. 18,18,429. Simultaneously, legal expenses of Rs. 10,043 and Rs. 13,500 being expenses attributable to issue of debentures were claimed as revenue expenses. These issues have been referred by way of question Nos. 1 and 4 and hence they are taken up together. The case of the assessee was that the expenses were relatable to working capital and hence, being revenue expenditure, were allowable as a deduction in light of the Supreme Court decision in the case of India Cements Ltd. Vs. Commissioner of Income Tax, Madras, . In the assessment order the claim was disallowed on the ground that the expenses in question were liable to be amortized in light of provisions of Section 35D of the Act. The Commissioner (Appeals) confirmed the disallowance. However, the Tribunal has allowed the deduction by referring to the decision of the Apex Court as well as Sub-section (6) of Section 35D of the Act.

4. Mr. M.R. Bhatt learned senior counsel appearing on behalf of the applicant revenue submitted that taking into consideration the provisions of Section 35D(2)(c)(iv) of the Act, once the expenses related to or were in connection with issue of debentures of the assessee company, the amount was allowable only to the extent of l/10th u/s 35D of the Act and balance was not allowable in the year under consideration. The learned advocate for respondent assessee relied on order of the Tribunal.

5. Section 35D of the Act stipulates under Sub-section (1) of allowing only 1/10th of expenditure for each of the 10 successive previous years beginning with the previous year in which the business commences or, as the case may be, the previous year in which extension of industrial undertaking is completed or new industrial unit commences production or operation. Sub-section (2) of Section 35D of the Act enumerates different kinds of expenditure which can be considered for the purpose of deduction under Sub-section (1) of Section 35D of the Act. However, before the provisions can be applied to the case of an assessee it has to be shown that the expenditure in question has been incurred either (1) before commencement of business, or; (2) after the commencement of business, but in connection with extension of industrial undertaking or in connection with setting up a new industrial unit. In the facts of the present case, the Tribunal has recorded, and there is no dispute on this count, that the expenditure in question is for the purposes of working capital in course of modernisation of the existing plant and machinery. Therefore, this is not a case which can fall within Clause (i) of Sub-section (1) of Section 35D of the Act, nor are the conditions stipulated by Clause (ii) of Sub-section (1) of Section 35D of the Act fulfilled. There is no finding that this expenditure was for

extension of existing industrial undertaking or setting up a new unit after commencement of the business. A faint suggestion was made on behalf of the revenue that in absence of such a finding the question should not be answered and the matter be left open so as to be decided by the Tribunal in accordance with law. However, when one considers the finding of the Tribunal that the expenditure has been incurred during the course of a modernisation programme, there is no question of invoking provisions of Section 35D of the Act and hence, it is not necessary to return the question unanswered.

6. In the facts and circumstances of the case, question Nos. 1 and 4 are answered in the affirmative, that is, in favour of assessee and against the revenue.

7. Insofar as the question No. 2 is concerned, question itself indicates that commission was paid to Indian agents based on the extent of export sales. The Tribunal has merely relied upon the assessee''s own case for the assessment year 1974-75. However, Mr. Bhatt invited attention to the Apex Court''s decision in the case of Commissioner of Income Tax, Delhi Vs. Stepwell Industries Ltd. and etc. etc., to point out that in similar circumstances commission paid to State Trading Corporation was held to be disallowable despite the fact that there were export sales in the said case. The learned advocate for respondent-assessee has placed reliance on the fact that export sales have taken place and hence, according to the learned advocate the deduction was allowable u/s 35B of the Act without any disallowance on this count.

8. The contention raised on behalf of assessee has been answered by the Apex Court in the following terms:

If the State Trading Corporation incurs expenditure for an advertisement or publicity outside India, the assessee will not be entitled to any deduction unless the assessee can establish that the advertisement or publicity was being done outside India for and on behalf of the assessee and in respect of goods the assessee deals in or provides in the course of his business. Likewise, if the State Trading Corporation maintains a branch office or agency for the promotion of sales outside India, the assessee cannot claim any deduction on account of maintenance of such branch office or agency but if such branch office or agency is maintained by the assessee himself for the promotion of sales outside India of his goods, services or facilities, then the assessee will be entitled to a deduction u/s 35B.

9. Applying the ratio of the Apex Court''s decision in the case of CIT v. Stepwell Industries Ltd. and Ors. (supra), question No. 2 is answered in the negative, that is, in favour of revenue and against the assessee.

10. Insofar as the question No. 3 is concerned, the facts recorded by the Tribunal show that deduction of Rs. 6,37,885 was claimed on the basis of provision for municipal tax as per bills for assessment years 1974-75 to 1980-81. However, the assessee disputed the liability and filed various suits in the civil court. The suits came to be withdrawn and the

matter was referred to arbitration subject to the condition that 65 per cent of outstanding liability be paid to the municipal corporation. In relation to the balance outstanding liability provisions of Section 41 of the Act were invoked by the assessing officer and confirmed by the Commissioner (Appeals). However, the Tribunal has held that provisions of Section 41 of the Act are not applicable.

11. On facts, it is apparent that the assessee disputed its liability qua the bills raised and such liability continued to exist, in the first instance during the pendency of court cases and thereafter due to pendency of arbitration proceedings. Mere withdrawal of court cases and submitting the disputes to arbitration would, in no case, amount to cessation of liability, which is the pre-requisite condition, for applying the provisions of Section 41 of the Act. The Tribunal has rightly come to the conclusion that in absence of cessation of liability Section 41 of the Act cannot be made applicable.

12. Accordingly, question No. 3 is answered in affirmative, that is, in favour of the assessee and against the revenue.

13. Insofar as question No. 5 is concerned, the same pertains to disallowance u/s 43B of the Act in relation to the municipal tax and education cess. Mr. Bhatt has very fairly pointed out that Section 43B of the Act has been made applicable with effect from 1-4-1984 and hence cannot be made applicable for assessment year 1983-84. Hence, in absence of any infirmity in the impugned order of Tribunal, question No. 5 is answered in the affirmative, that is, in favour of assessee and against the revenue.

14. The reference is answered accordingly in relation to all the five questions, and hence, stands disposed of with no order as to costs.