(1991) 04 KL CK 0028

High Court Of Kerala

Case No: Income-tax Reference No''s. 176 to 187 of 1987

Commissioner of Income Tax		APPELLANT
	Vs	
Kerala Nut Food Co., P. Gopinatha Pillai, M. Shamsuddin and Co., Indian Nut Products, Asiatic Export Enterprises and General Industrial Corporation		RESPONDENT

Date of Decision: April 2, 1991

Acts Referred:

- Income Tax Act, 1961 - Section 35B, 35B(1)

Citation: (1991) 192 ITR 585

Hon'ble Judges: K.S. Paripoornan, J; K.P. Balanarayana Marar, J

Bench: Division Bench

Advocate: P.K.R. Menon and N.R.K. Nair, for the Appellant; P. Balachandran, for the Respondent

Judgement

K.S. Paripoornan, J.

In this batch of 12 referred cases, a common question arises for consideration. These cases have been referred by the Income Tax Appellate Tribunal, Cochin Bench, at the instance of the Revenue, and as directed by this court in 0. P. Nos. 8381, 8382, 8384, 8387, 8388, 8450, 8451, 8676, 8677, 8712, 8713 and 8737 of 1984 (see Commissioner of Income Tax Vs. Kerala Nut Food Co., P. Gopinatha Pillai, M. Shamsuddin and Co., Indian Nut Products, Asiatic Export Enterprises, General Industrial Corporation, L. Kunjukunju and Malabar Cashewnuts and Allied Products,

The referred cases arise out of R. A. Nos. 106 to 114, 117 and 118 and 120/(Coch) of 1983 in ITA Nos. 333 to 337, 340 to 343, 348 and 349 and 360/(Coch) of 1981. The applicant in all the cases is the Revenue. The respondents in this batch of 12 referred cases, are six different assessees. The Appellate Tribunal disposed of the 12 appeals (ITA Nos. 333 to 337, 340 to 343, 348, 349 and 360/(Coch) of 1981) by a

common order dated February 26, 1983. Though there are six different assessees, the assessment years involved in this batch of cases are 1976-77, 1977-78, 1978-79, 1979-80 and 1980-81. The Revenue filed applications u/s 256(1) of the Income Tax Act, in the 12 cases, before the Income Tax Appellate Tribunal praying to refer three questions of law. But, the Income Tax Appellate Tribunal referred a common question of law for alt the 12 cases, which v/as the subject-matter of I. T. R. Nos. 91 to 102, 203 and 211 of 1984. The said common question was to the following effect (see [1990] 185 ITR 152) ;

"Whether, on the facts and in the circumstances of the case, the commission payments made in India in respect of exports made by the assessees to the U. S. S. R. are entitled to weighted deduction u/s 35B of the Income Tax Act, 1961 ?"

2. The said referred cases (I. T. R. Nos. 91 to 102, 203 and 211 of 1984) as also 0. Ps. Nos. 8381, 8382, 8384, 8387, 8388, 8450, 8451, 8676, 8677, 8712, 8713 and 8737 of 1984 were heard and disposed of by a common judgment by a Bench of this court on June 18, 1987. The judgment is reported in Commissioner of Income Tax Vs. Kerala Nut Food Co., P. Gopinatha Pillai, M. Shamsuddin and Co., Indian Nut Products, Asiatic Export Enterprises, General Industrial Corporation, L. Kunjukunju and Malabar Cashewnuts and Allied Products, .

3. For the reasons stated in the said judgment, this court declined to answer the question referred by the Income Tax Appellate Tribunal in the various Income Tax referred cases, but directed the Income Tax Appellate Tribunal to refer three questions of law, specified in paragraph 7 of the original petitions, for the decision of this court. This court declined to answer the common question referred in the 12 cases. At the same time, the 12 original petitions were allowed and the Income Tax Appellate Tribunal was directed to refer three questions of law and to forward along with the statement of the case the necessary documents including the judgment of the Special Bench of the Tribunal in I. T. A. Nos. 3255 and 3320/Bom/ of 1976-77 and a copy of the circular of the Central Board of Direct Taxes dated December 28, 1981. The three questions of law referred by the Income Tax Appellate Tribunal are as follows (see [1990] 185 ITR 153) :

"1. Whether, on the facts and in the circumstances of the case, the commission payment qualifies for weighted deduction u/s 35(1)(b)(i) and (ii) of the Income Tax Act, 1961 ?

2. Whether, on the facts and in the circumstances of the case, the Tribunal is right and reasonable in finding that collecting the necessary information regarding the goods for export from the exporters by the trade representative in India through the seller''s agent is a necessary indication that the agents render services to the exporters by obtaining information regarding markets outside India for their goods ?

3. Whether, on the facts and in the circumstances of the case, and considering the ''services'' referred to by the Tribunal, the Tribunal is right in law and fact in holding :

(i) that what the agents actually do is to give advertisement and publicity outside India in respect of the goods of the assessee and obtain information regarding markets outside India for such goods ?

(ii) that these are services incidental to the formation of the contract falling under Sub-clauses (i) and (ii) of Clause (b) of section 35B(1) ?"

4. This court, in directing the Income Tax Appellate Tribunal to refer the above three questions of law, had particularly requested the Appellate Tribunal to forward along with the statement of the case a copy of the judgment of the Special Bench of the Income Tax Appellate Tribunal in J. Hemchand and Co. (ITA Nos. 3255 and 3330/(Bom) of 1976-77 dated June 17, 1978), along with a copy of the circular of the Central Board of Direct Taxes dated December 28, 1981. It was so done, because the said two documents were not available when the matter was heard on the earlier occasion. In the common order dated February 26, 1983, the Appellate Tribunal had made a specific reference to the decision of the Special Bench of the Income Tax Appellate Tribunal in the case of J. Hemchand and Co., and also the fact that the said Special Bench decision was accepted by the Department and so followed by the Tribunal in similar cases, whenever applicable. In this batch of 12 referred cases, along with the statement of the case, the Income Tax Appellate Tribunal has forwarded as annexure-H the decision of the Special Bench of the Tribunal in ITA Nos. 3255 and 3330/Bom of 1976-77 dated June 17, 1978, and as annexure H-1 a copy of the Circular of the Central Board of Direct Taxes --F. No. 268/738/S1-ITJ dated December 28, 1981, styled as Instruction No. 1441.

5. We heard counsel for the applicant/Revenue, Mr, P. K. R. Menon, as also counsel for the respondents/assessees, Mr. P. Balachandran. The salient facts of the case are not in dispute. The respondents/assessees are exporters of cashew kernels to the U. S. S. R. The export contracts are similar in all the cases. The sole question that arises for consideration in these cases is whether the assessees are eligible for weighted deduction u/s 35B of the Income Tax Act in respect of commission payments made to the agents in India in the sales of the assessees'' goods outside India. The nature of payment of commission is identical in all the cases. The Indian agents, referred to above, include Kasturi Nagesh Pai and Co., Bombay, Rajeet V. Bhat, Bombay, Nut Meat Trading Co., Bombay, the Cashew Corporation of India and Rapal Trading Co., Bombay. The commission payment is made in India at the rate of 1% of the invoice amount. The assessees had entered into agreements with the Trade Mission of the U. S. S. R. with regard to the export sales and the export contracts are routed through one of the aforesaid agents referred to as the "sellers'' agent". An irrevocable letter of credit was opened in the name of the sellers'' agent. The terms of the contract itself provided that, out of the invoice amount, 1% is payable to the sellers'' agent. The claim of the assessees for weighted deduction u/s 35B(1) of the

Act in respect of the commission amount was rejected by the Income Tax Officer holding that the payment is not expenditure incurred on any of the activities specified in the various Sub-clauses of Clause (b) of section 35B(1) of the Act, The claim of the assessees was accepted by the Commissioner of Income Tax (Appeals) who held that the expenditure had been incurred for the purpose of locating markets outside India for the assessees'' products. The Commissioner of Income Tax (Appeals) followed the decision of the Appellate Tribunal in similar cases, rendered on earlier occasions. The matter was taken up in appeals by the Revenue before the Income Tax Appellate Tribunal. It was contended by the Revenue that in the case of sales to the U. S. S. R. the purchase is handled by the trade representative of the U. S. S. R., that the Indian agents did not render any service to the Indian exporters which would fall under Clause (b) of section 35B(1) of the Act and that the expenditure, if at all, is in relation to the distribution and supply of goods, hit by Sub-clause (iii) of the section and so the commission payments did not qualify for weighted deduction u/s 35B(1)(b) of the Act.

6. The Appellate Tribunal, in its common order dated February 26, 1983, referred to the decision of the Special Bench of the Income Tax Appellate Tribunal in J. Hemchand and Co.''s case (ITA Nos. 3255 and 3330/(Bom) of 1976-77 dated June 17, 1978), and held that the commission payments to parties who brought about the export sales is allowable under Sub-clauses (i) and (ii) of Clause (b) of Sub-section (1) of section 35B for the reason that it was these agents who furnished information to the assessees about the foreign buyers and publicised the goods of the assessees to those buyers and it was they who brought together the buyer and the seller for concluding the sales and that it was through them that the goods were supplied outside India. On these premises, the Tribunal allowed the weighted deduction u/s 35B(1)(b)(i) and (ii) of the Income Tax Act. It is the aforesaid decision of the Appellate Tribunal which is challenged before us.

7. As stated earlier, we are concerned with the cases of six different assessees involving the assessment years 1976-77, 1977-78, 1978-79, 1979-80 and 1980-81. Section 35B(1)(a) and section 35B(1)(b) of the Act were inserted by the Finance Act, 1968, with effect from April 1, 1968. The proviso to Sub-section (1)(a) was inserted by the Direct Taxes (Amendment) Act,'' 1974. Section 35B(1)(b)(iii) was amended by the Finance Act, 1970. The Finance Act, 1978, made certain amendments with effect from April 1, 1978, and it was later omitted with effect from April 1, 1980. So, for the period from April 1, 1978, till March 31, 1980, there were certain additional conditions that had to be complied with by the assessees. For the assessment years 1978-79 and 1979-80, the provisions introduced by the Finance Act of 1978 and deleted with effect from April 1, 1980, will have their impact and a different look with regard to the provisions may be possible. But, we should state that no distinction was made regarding the applicability of section 35B of the Income Tax Act for all the five assessment years involved in this batch of referred cases. A new plea, that for the assessment years 1978-79 and 1979-80 different considerations on the basis of

the then prevalent statutory provisions will apply, was sought to be raised. We declined to entertain the said plea as it was not put forward before the Appellate Tribunal and no distinction was drawn on that basis in the approach to the question that arose for consideration. The Appellate Tribunal was not invited to make a different approach for the two years (1978-79 and 1979-80), The difference brought about by the Finance Act is not seen mentioned at all and the Appellate Tribunal had no occasion to consider the same in its appellate order ; nor was any such distinction for the two years (1978-79 and 1979-80) pointed out, either in the reference applications or by way of framing an appropriate question to be referred to this court. Even the statement of case, forwarded to this court as late as on February 1, 1991, does not make any mention about the distinction sought to be made for the two years (1978-79 and 1979-80). So, we shall proceed on the basis that identical provisions of law will apply for all the five years (1976-77, 1977-78, 1978-79, 1979-80 and 1980-81).

8. We shall extract section 35B(1)(a) and (b) of the Income Tax Act, 1961 ;

"35B. (1)(a) Where an assessee, being a domestic company or a person (other than a company) who is resident in India, has incurred after the 29th day of February, 1968, whether directly or in association with any other person, any expenditure (not being in the nature of capital expenditure or personal expenses of the assessee) referred to in Clause (b), he shall, subject to the provisions of this section, be allowed a deduction of a sum equal to one and one-third times the amount of such expenditure incurred during the previous year :

Provided that in respect of the expenditure incurred after the 28th day of February, 1973, by a domestic company, being a company in which the public are substantially interested, the provisions of this clause shall have effect as if for the words ''one and one-third times'', the words ''one and one-half times'' had been substituted.

(b) The expenditure referred to in Clause (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, not being expenditure incurred in India in connection therewith or expenditure (wherever incurred) on the carriage of such goods to their destination outside India or on the insurance of such goods while in transit ;

(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."

9. The Appellate Tribunal has categorically held that the services rendered by the seller''s agent are incidental to the formation of the contract falling under Sub-clauses (i) and (ii) of Clause (b) of section 35B(1) of the Act and so the commission payments made to them qualify for weighted deduction u/s 35B(1) of the Income Tax Act. The Appellate Tribunal has considered the matter, bearing in mind the decision of the Special Bench of the Income Tax Appellate Tribunal in J. Hemchand and Co.''s case (ITA Nos. 3255 and 3330/Bom/of 1976-77 dated June 17, 1978), and in particular, the decision so expressed in paragraph 28 of the said order. Annexure-H to the statements of the case is the aforesaid deci sion of the Special Bench dated June 17, 1978. In paragraph 28 of the said order, the Appellate Tribunal has stated thus :

"The commission payment in this case was to parties who brought about the export sales. It was those parties who furnished information to the assessee about the foreign buyers and publicised the assessee''s goods to those buyers. It was they who brought together the buyer and the seller for concluding the sales. It was through them that the goods were supplied outside India. That being so this expenditure is allowable under Sub-clauses (i) and (ii) of Clause (b) of Sub-section (1) of section 35B."

10. Annexure-H 1 is a copy of the circular issued by the Central Board of Direct Taxes dated December 28, 1981. It will be useful to extract the entire circular, which is to the following effect:

"Instruction No. 1441 --XXVII/I/93 --Deduction u/s 35B--iTAT''s decision in the case of /. Hemchand and Company (ITA Nos. 3255 and 3330/BOM of 1976-77, dated June 17, 1978)--Clarification regarding.

Attention is drawn to the Board''s Instruction No. 1302 dated January 29, 1980. It was clarified therein that the sole question to be determined in considering the admissibility of weighted deduction is whether the expenditure in question is one

covered by any of the sub-clauses of Clause (b). The Board also accepted that in case there is composite expenditure a part of which may relate to any of the purposes mentioned in the sub-clauses, the claim can be allowed in respect of and to the extent the expenditure can be said to be incurred wholly and exclusively with reference to any of the items specified in Clause (b) of section 35B(1). In particular, the instruction (para 4) referred to expenses claimed on export division and emphasised that after critical examination of the nature of such expenditure, the extent to which such expenditure could be said to fall wholly and exclusively within the meaning of one or more Sub-clauses of Clause (b) of Sub-section (1), can be determined.

2. Attention may also be drawn to the decision of the Bombay High Court in the case of Commissioner of Income Tax, Bombay City-VI, Bombay Vs. Eldee Wire Ropes Ltd., which had been accepted by the Board. The High Court had held that except for items covered under Clause (in) there is no warrant for excluding expenditure incurred in India as is covered in any sub-clause of Clause (b). The court further held that the assessee will have to satisfy the Income Tax Officer that the purpose for expenditure, whether incurred outside India or in India, is one which is satisfied by reference to the language of the section. The court further observed that where the Legislature desired to exclude the expenditure incurred in India for the purpose of giving benefit of weighted deduction, it expressly did so by specifically mentioning such exclusion in Sub-clause (iii).

3. Then came the decision of the Special Bench of the Tribunal at Bombay in the case of J. Hemchand and Co. which laid down the following propositions of law in paras 22 and 23 of its order dated June 17, 1978. These are as under : --

(a) Except for the purpose of Sub-clause (iii), the place where the expenditure is incurred is irrelevant and any expenditure satisfying the conditions laid down in Sub-clauses (i), (ii), and (iv) to (viii) will get the benefit of weighted deduction irrespective of whether the same is incurred in or outside India.

(b) Under Sub-clause (iii), though expenditure incurred wholly and exclusively on distribution, supply or provision outside India of such goods, services or facilities would generally qualify for weighted deduction, the rule is, however, subject to the notable exception that expenditure incurred in India in connection with such distribution, supply or provision as also expenditure, wherever incurred, on the carriage of such goods to their destination outside India and on the insurance of such goods while in transit, will not all the same get such benefit.

(c) Wherever common expenses are incurred by an assessee that could properly and fairly be apportioned to any of the activities referred to in the Sub-clauses, such proportionate expense can be taken for the purpose of this section as wholly and exclusively spent on such activity.

4. It may be clarified that the Board agrees with the above interpretation of the provisions of section 35B, The Tribunal has also correctly stated in the said order that whether a particular claim made by an assessee falls under any one or more of the activities specified, in those sub-clauses, can at best be judged only with reference to the facts of the particular case and the nature of the claim. The Tribunal thereafter examined the various items of expenses. It appears to the Board that the decision of the Tribunal in respect of some items of expenses treating them as admissible for weighted deduction wholly or proportionately, may be controversial and not acceptable to the Department. In particular its decision to allow 75% of salary of persons handling export business could still be a matter of dispute, because though accepting that the assessee''s employees as part of their duty could not have avoided attending also to such work as falls within the excluded category in sub-clause (iii), it decided to apportion only 25% of the expenditure on salaries, etc., attributable to excluded activities. But for upholding 75% thereof as admissible for weighted deduction it did not at all discuss the nexus of such expenses with the purposes or activities specified in other sub-clauses. In other words the claim with regard to 75% of the salaries could not be proved to be falling under any one or more of the activities specified in other sub-clauses.

5. The Board have also noticed subsequent decisions of different Benches of the Tribunal which, while dealing with the claim of admissibi-lity with regard to salaries paid to Export Department personnel, are merely following the Full Bench decision and are apportioning 75% of the expense as admissible for weighted deduction. In some of the cases the Tribunal did mention that part of such expenses were attributable to preparation and submission of tenders for the supply outside India of goods, services, etc. Even in such a case, though on facts part of the activity may have nexus with sub-clause (v), the question may still remain whether apportionment at 75% is reasonable or excessive. Such issue would be basically a finding of fact and can be further contested, depending on the state of revenue involved, by seeking reference to the High Court by raising appropriate questions of law on the ground of perversity. Therefore, each case should be considered in the light of whatever is stated above and framing of the question of law should be done carefully.

6. It may also be clarified that the Full Bench decision with regard to admissibility of weighted deduction in respect of insurance amount paid to the Export Credit Guarantee Corporation is not correct. In fact, on this issue, a SLP had been filed in the Supreme Court in the case of CIT, Karnataka v. Orient Co. (P.) Ltd. (F. No. 270/155/80-ITJ).

7. The above instructions may please be brought to the notice of all the officers working in your charge.

[F. No. 268/738/S1-ITJ, dated December 28, 1981, from Central Board of Direct Taxes.]"

11. The Circular of the Central Board of Direct Taxes has the force of law. It can even supplant the law in cases where it is beneficial to the assessee and has mitigated or relaxed the rigour of the law. The circular can be enforced by the courts : See Ellerman Lines Ltd. Vs. Commissioner of Income Tax, West Bengal, Calcutta, ; Keshavji Ravji and Co. v. CIT : [1990]183ITR1(SC) ; K.P. Varghese Vs. Income Tax Officer, Ernakulam and Another, and Commissioner of Income Tax Vs. Punalur Paper Mills Limited, It is evident from a perusal of annexure H and annexure H-1 that the commission payment made to parties to bring about the export sales will be entitled to weighted deduction irrespective of the fact whether the same is incurred in India or outside India.

12. In this batch of 12 cases, the Appellate Tribunal referred to its earlier decision in the case of C. Tharian and Sons, Kottarakara (ITA Nos. 48 and 411 (Cochin) 78-79) for the assessment years 1975-76 and 1976-77 and held that the commission paid to the agent in India on export to Russia falls under Sub-clauses (i) and (ii) of section 35B(1)(b) of the Act. The plea of the Revenue that the expenditure is in connection with the distribution of the assessee''s goods and so hit by Sub-clause (iii) of section 35B(1)(b) was rejected by the Appellate Tribunal. C. Tharian and Sons'' case, referred to by the Appellate Tribunal in paragraph 8 of its order, came up before this court in 1TR Nos. 7 and 8 of 1982 (Commissioner of Income Tax Vs. C. Tharian and Sons,) and a Bench of this court, by judgment dated February 11, 1987, held that the burden is on the assessee to prove that the expenses were incurred '"'outside India" for specified activities performed "outside India", though payment may be made in India, in order to claim weighted deduction u/s 35B of the Act. It was held that the assessee should prove that the commission paid was wholly and exclusively for the specified activities carried on outside the country. In the said cases, it does not appear that the decision of the Special Bench of the Tribunal in J. Hemchand and Co. ''s case or the Circular of the Central Board of Direct Taxes, dated December 28, 1981 (annexures H and H-1) were brought to the notice of this court, No mention is made about the decision of the Special Bench aforesaid ; nor about the aforesaid circular of the Central Board of Direct Taxes which has accepted the decision of the Special Bench of the Tribunal, whereby the interpretation of the provisions of section 35B of the Act made by the Special Bench was concurred with. The decision of the Special Bench in /. Hemchand and Co.''s case and the acceptance thereof by the Central Board of Direct Taxes, by issuing the circular, are cogent and relevant factors. In so far as the said circular is beneficial to the assessee, it should be given effect to and section 35B of the Act should be understood in that light and given effect to only in that perspective. It is also brought to our notice that the dictum in Commissioner of Income Tax Vs. C. Tharian and Sons, was explained by the Bombay High Court in Commissioner of Income Tax Vs. Sahney Steel and Press Works (P.) Ltd., . In these circumstances, the decision of this court in Commissioner of Income Tax Vs. C. Tharian and Sons, and the decisions following the same are distinguishable and should be understood as rendered only "per incuriam". The fact

that the decision of the Special Bench of the Appellate Tribunal in /. Hemchand and Co.''s case (ITA Nos. 3255 and 3330/Bom of 1976-77 dated June 17, 1978) stated that the commission payments to parties who brought about the export sales are allowable as deduction under Sub-clauses (i) and (ii) of Clause (b) of Sub-section (1) of section 35B of the Act, and that the said decision was accepted and adopted as part of the (beneficent) circular issued by the Central Board of Direct Taxes dated December 18, 1981 (annexure-H1), specifically urged and accepted by the Appellate Tribunal in this batch of cases, throws a flood of light and logic to the reasoning and conclusion regarding the applicability of section 35B of the Income Tax Act and the eligibility for the deduction claimed. Even if the circular of the Central Board of Direct Taxes has gone beyond the parameters drawn in section 35B of the Income Tax Act, in so far as the circular contained a provision beneficent to the assessee, the circular should be given effect to and that has been rightly so done by the Appellate Tribunal.

13. The Income Tax Appellate Tribunal adverted to the plea of the Revenue that the commission payment made to the seller''s agent (Indian agent) will fall only under Sub-clause (iii) and repelled the same. In its reasoning, the Appellate Tribunal referred to the statement of Kasturi Nagesh Pai and Co. (seller''s agent) to the Income Tax Officer detailing their role in the transaction as extracted in the assessment order dated February 29, 1980. The Appellate Tribunal also referred to the sample form of the contract containing the general terms and conditions, the contracts signed by the agents on behalf of the sellers, the correspondence that passed between the exporters and their agents, the telex messages in the course of such correspondence, etc. Finally, the Appellate Tribunal, after a review of the entire facts and circumstances, recorded its findings as follows :

". . . In the cases before us, there had been a trade agreement between the U. S. S. R. Chamber of Commerce and Industries and the Federation of Indian Chamber of Commerce and Industries referred to in paragraph 8 of the General Terms and Conditions of Contract. The export contracts in pursuance of such agreement are routed through the seller''s agent who signed the contract subject to the general terms and conditions. This is evident from contract No. KM/1378 dated December 16, 1977, filed in the case of Kerala Nut Foods Co., signed by the seller''s agent Messrs. Ranjit V. Bhat on behalf of the seller. It is also seen from paragraph 5 of the standard contract that the seller is to advise the agent and the trade representative of the U. S. S. R. in India the quantity and value of goods for shipment to enable the buyers to arrange opening of letters of credit. The payment for the goods under the contract as detailed in paragraph 6 is made through an irrevocable letter of credit established by the buyers in favour of the seller''s agent for 98% of the value of the goods through bank and the payment through the letters of credit is to be effected against the documents specified and 1% of the value under the invoice is to be paid to the seller''s agent. The seller is to send one copy of each document to the seller''s agent and the trade Representative of the U. S. S. R. The Commodity Examination

Bureau of the U. S. S. R. Chamber of Commerce draws up a survey report. Copies of the laboratory analysis enclosed with the survey report thus drawn up are sent to the seller''s agent for taking necessary steps for improving quality control and production. One of the telex messages in the course of the correspondence between the exporter, the agent and the trade representative made available before us indicates that the trade representative in India, through the seller''s agent, collects the necessary information regarding the goods for export from the exporters. It is a necessary indication that the agents render services to the exporters by obtaining information regarding markets outside India for their goods. When they give the Trade Representation regular market reports like the. raw cashew nuts position both in India and other producing countries, the price prevailing in all these sources of supply, the kernel''s price on consultation with the exporters, what the agents actually do is to give advertisement and publicity outside India in respect of the goods of the assessee and obtain information regarding markets outside India for such goods. These are services incidental to the formation of the contract falling under Sub-clauses (i) and (ii) of Clause (b) of section 35B(1)."

14. On a resume of the facts and circumstances stated above, it cannot be denied that the commission payments made by the assessees are for services rendered to them. The services are incidental to the formation of the contract falling under Sub-clauses (i) and (ii) of Clause (b) of section 35B(1) of the Income Tax Act. It is evident that the agents render positive and specific services for the marketing of the goods in which the assessee deals in the course of his business. The commission agents obtained information regarding the markets outside India regarding the goods for export. They render services to the exporters by obtaining information regarding markets outside India for the assessee''s goods and they actually give advertisement and publicity outside India in respect of the goods of the assessee and also obtain information regarding markets outside India for the goods exported by the assessee. The commission payments will certainly qualify for weighted deduction u/s 35B(1)(b)(i) and (ii) of the Income Tax Act.

15. We answer question No. 1. in favour of the assessees and against the Revenue. Questions Nos. 2 and 3 proceed on the basis, as to whether the findings of the Tribunal are right and reasonable. We have extracted in detail the findings of the Appellate Tribunal and also referred to the materials on the basis of which the Tribunal has entered specific findings to say that the commission agents render services and obtain information coming within section 35B(1)(b)(i) and (ii) of the Act. A perusal of the materials referred to by the Appellate Tribunal and the findings entered will demonstrate that the Appellate Tribunal was justified and acted rationally in entering the findings it had arrived at. We are of the view that questions Nos. 2 and 3, formulated hereinabove and referred to this court, largely depend upon questions of fact and the findings entered by the Tribunal in those regions are supported by the materials referred to in the order of the Appellate Tribunal, paragraphs 10 and 11 of the appellate order. In the questions formulated and

referred to this court, the Revenue has not challenged the findings of fact entered by the Appellate Tribunal as based on no material or arbitrary or based on mere conjectures. The findings entered by the Appellate Tribunal in paragraph 11 of its order are logically in accord with the facts and other circumstances of the case. We answer questions Nos. 2 and 3 in favour of the assessees and against the Revenue.

16. The references are disposed of as above.

17. A copy of this judgment under the seal of this court and the signature of the Registrar shall be forwarded to the Income Tax Appellate Tribunal, Cochin Bench.