(2006) 204 CTR 257 : (2006) 3 KLT 592

High Court Of Kerala

Case No: ITR No. 18 of 1999

Parry Agro Industries Ltd.		APPELLANT
	Vs	
Commissioner of Income Tax		RESPONDENT

Date of Decision: July 21, 2006

Acts Referred:
Income Tax Act, 1961 â€" Section 10, 14, 15, 16, 17

Citation: (2006) 204 CTR 257 : (2006) 3 KLT 592

Hon'ble Judges: V.K. Bali, C.J; S. Siri Jagan, J; P.R. Raman, J

Bench: Full Bench

Advocate: Antony Dominic, for the Appellant; P.K. Raveendranatha Menon and Anil D. Nair, for the Respondent

Judgement

S. Siri Jagan, J.
This Income Tax Reference comes up for hearing before us since a Division Bench of this Court doubted the correctness

of another Division Bench decision in Commissioner of Income Tax Vs. Kil Kothagiri Tea and Coffee Estate Co. Ltd., , on the same point as in

this case.

2. The Income Tax Appellate Tribunal, Cochin Bench referred the following question of law for the opinion of this Court u/s 256(1) of the Income

Tax Act:

Whether on the facts and in the circumstances of the case the Tribunal was right in holding that the profits of eligible business computed in

accordance with the requirements of Parts II and 111 of Schedule VI to the Companies Act, 1956 should be reduced by income from coffee

sales, arecanut sales, rent receipts, interest and subsidy from Tea Board for the purpose of computing the deduction allowable under Sub-clause

(ii) of Clause (b) of Section 32AB (1)?

3. The brief facts necessary for deciding this case are as follows.

4. The assessee is engaged in the plantation business. Apart from their business income, they received the following income from other sources as

well.

Rent Rs. 29,606.00

Interest Rs. 6,27,608.00

Sundry receipts Rs. 95,402.00

(Sundry receipts are by way of sale of coffee, arecanut and receipt of subsidy from the Tea Board).

The assessee, in its income tax return, claimed deduction of an amount of Rs. 37,02,849/- under the then existing Section 32AB of the Income Tax

Act on the basis of the entire income of the previous year. The assessing officer allowed the deduction of the amount calculated without including

the rent, interest and sundry receipts. The Commissioner (Appeals) agreed with the assessing officer. Tribunal also concurred with the view taken

by the assessing officer and the Commissioner (Appeals).

5. A Division Bench of this Court in the decision reported in Commissioner of Income Tax Vs. Kil Kothagiri Tea and Coffee Estate Co. Ltd., ,

held that for the purpose of computing the 20% deduction u/s 32AB of the Act, income from all sources except those which are excluded from

computation under the Section itself has to be taken into consideration. The Division Bench which considered the present ITR found it difficult to

accept the reasoning of the earlier Division Bench decision in Kil Kothagiri case and referred it for hearing by a Full Bench.

6. We have heard counsel on both sides at length. As we have already indicated, the only question to be decided in this case is as to whether for

the purpose of computing the deduction u/s 32AB, the expression ''profits of eligible business or profession'' includes income of the assessee from

all sources as computed in accordance with the Sixth Schedule to the Companies Act, 1956 or whether it is restricted to income from ''profits and

gains of business or profession'' alone.

7. First part of Sub-section(1) of Section 32AB contains the eligibility conditions for availing of the benefit of deduction. Eligibility of the assessee

for getting deduction is not in dispute before us. The second part of Sub-section(1) provides for the benefit of deduction, as per which 20% of the

profits of eligible business or profession is the amount allowable as deduction. Sub-section(2) defines what is eligible business or profession. Sub-

section(3) stipulates the method of computation of the profits of eligible business or profession as per which the same is to be arrived at after

deducting the depreciation in accordance with Sub-section (1) of Section 32 from the amounts of profits computed in accordance with the

requirements of Parts II and III of Sixth Schedule to the Companies Act. Parts II and III to the Sixth Schedule to the Companies Act lay down the

requirements as to profit and loss account. Therefore, all income which can be included in the profit and loss account of the assessee-Company

has to be taken into account for the purpose of computing the quantum of deduction, learned Counsel for the assessee submits. Counsel for the

assessee heavily relies on the decision of the Division Bench in Kil Kothaqiri case as also the decision of the Supreme Court in Apollo Tyres Ltd.

Vs. Commissioner of Income Tax, Kochi, which decision was also sought to be relied on in Kil Kothagiri case.

8. On the other hand, the learned standing counsel for the Income Tax Department would contend that only those income which would constitute

the business income of the company alone can be taken into account for computation of the quantum of deduction u/s 32AB and not the income

from all sources as contended by the assessee. Standing counsel would argue that Kil Kothagiri case was wrongly decided and the dictum in

Apollo Tyre''s case was wrongly understood by the Division Bench in Kil Kothaqiri case. Standing counsel submits that in Apollo Tyre''s case, the

Supreme Court found that the dividend from investment in UTI was in fact profits and gains of business or profession itself of the Company as the

assessee-company in that case was conducting the business of investment in the units of UTI as its business along with the business of tyre

manufacturing as a result of which only Apollo Tyres Ltd., was held to be entitled to take into account that income also for the purpose of

computation of deduction u/s 32AB and not because income from all sources was includible for the purpose of computing the quantum of

deduction.

9. We have considered the rival arguments in detail. We are of opinion that for the reasons given herein below, for the purpose of computing the

quantum of deduction u/s 32AB, only that income which forms the profits and gains of business or profession of the assessee-company is liable to

be taken into account and not the income from other sources like rent income, interest income and sundry receipts, as claimed by the assessee.

10. Section 32AB forms part of Chapter IV of the Income Tax Act which deals with computation of total income of the assessee which contains

Sections 14 to 43D (as in the Statute Book in 1988). Chapter IV is then sub-divided into five separate heads of income by Section 14, which are

A Salaries.

B (deleted).

C Income from house property,

D Profits and gains of business or profession.

E Capital gains.

F Income from other sources.

Section 32AB comes within the sub-heading D, namely, profits and gains of business or profession. Sections 28 to 44D come within this sub-

heading.

11. Section 28 of the Income Tax Act enumerates the income chargeable to income tax under the head ""Profits and gains of business or

profession"" thus:

28. Profits and gains of business or profession.- -The following income shall be chargeable to Income Tax under the head ""Profits and gains of

business or profession"",-

(i) the profits and gains of any business or profession which was carried on by the assessee at any time during the previous year;

(ii) any compensation or other payment due to or received by, -

(a) any person, by whatever name called, managing the whole or substantially the whole of the affairs of an Indian company, at or in connection

with the termination of his management or the modification of the terms and conditions relating thereto;

(b) any person, by whatever name called, managing the whole or substantially the whole of the affairs in India or any other company, at or in

connection with the termination of his office or the modification of the terms and conditions relating thereto;

(c) any person, by whatever name called, holding an agency in India for any part of the activities relating to the business of any other person at or in

connection with the termination of the agency or the modification of the terms and conditions relating thereto;

(d) any person, for or in connection with the vesting in the Government, or in any corporation owned or controlled by the Government, under any

law for the time being in force, of the management of any of any property or business;

(iii) income derived by a trade, professional or similar association from specific services performed for its members;

(iv) the value of any benefit or perquisite, whether convertible into money or not, arising from business or the exercise of a profession;

(v) any interest, salary, bonus, commission or remuneration, by whatever name called, due to, or received by, a partner of a firm from such firm.

Explanation 1.-- The profits and gains of a business shall include the profits and gains of managing agency.

Explanation 2.-- Where speculative transactions carried on by an assessee are of such a nature as to constitute a business, the business (hereinafter

referred to as ""speculation business"") shall be deemed to be distinct and separate from any other business.

12. We shall reproduce Section 32AB (as it existed in the Statute Book in 1988) with only the portions relevant for our decision, which would

read thus:

32AB. Investment deposit account.- (1) Subject to the other provisions of this section, where an assessee, whose total income includes income

chargeable to tax under the head ""profits and gains of business or profession"", has, out of such income,-

(a) deposited any amount in an account (hereafter in this section referred to as deposit account) maintained by him with the Development Bank

before the expiry of six months from the end of the previous year or before furnishing the return of his income,whichever is earlier; or

(b) xxx xxx xxx

In accordance with, and for the purposes specified in, a scheme...the assessee shall be allowed deduction of....

(i) xxx xxx xxx

(ii) a sum equal to twenty per cent of the profits of eligible business or profession as computed in the accounts of the assessee audited in

accordance with Sub-section(5)

xxx xxx xxx

(2) For the purposes of this section, -

(i) eligible business or profession"" shall mean business or profession, other than -

(a) the business of construction, manufacture or production of any article or thing specified in the list in the Eleventh Schedule earned on by an

industrial undertaking, which is not a small-scale industrial undertaking as defined in Section 80HHA;

(b) the business of leasing or hiring of machinery or plant to an industrial undertaking, other than a small-scale industrial undertaking as defined in

Section 80HHA. engaged in the business of construction, manufacture or production of any article or thing specified in the list in the Eleventh

Schedule.

(i) xxx xxx xxx

(ii) xxx xxx xxx

(3) The profits of eligible business or profession of an assessee for the purposes of Sub-section(1)shall,-

(a) in a case where separate accounts in respect of such eligible business or profession are maintained, be an amount arrived at after deducting an

amount equal to the depreciation computed in accordance with the provisions of Sub-section(1) of Section 32 from the amounts of profits

computed in accordance with the requirements of Parts II and III of the Sixth Schedule to the Companies Act, 1956 (1 of 1956) as increased by

the aggregate of-

(i) the amount of depreciation;

(ii) the amount of Income Tax paid or payable, and provision therefor;

(iii) the amount of surtax paid or payable under the Companies (Profits) Surtax Act, 1964 (7 of 1964);

(iv) the amounts carried to any reserves, by whatever name called;

(v) the amount or amounts set aside to provisions made for meeting liabilities, other than ascertained liabilities;

(vi) the amount by way of provision for losses of subsidiary companies; and

(vii) the amount or amounts of dividends paid or proposed.

if any debited to the profit and loss account; and as reduced by any amount or amounts withdrawn from reserves or provisions, if such amounts are

credited to the profit and loss account; and

(b) in a case where such separate accounts are not maintained or are not available, be such amount which bears to the total profits of the business

or profession of the assessee after allowing depreciation in accordance with the provisions of Sub-section(1) of Section 32, the same proportion as

the total sales, turnover or gross receipts of the eligible business or profession bear to the total sales, turnover or gross receipts of the business or

profession carried on by the assessee.

xxx xxx xxx.

The deduction as per Section 32AB is from the income under the head "profits and gains of business or profession". From the same, 20% of the

"profits of eligible business or profession" is the deduction permitted. "Eligible business or profession is defined to mean "business or profession"

other than those described in Sub-section 2(i). Here, it should be noted that all throughout the Section, the expression used is "profits of business

or profession" which would indicate that what was in contemplation of the Legislature was only deduction of 20% of the "profits of business or

profession" by making the same "eligible" by excluding those "profits of business or profession" excepted by Sub-section 2(i)(a) and (b) from the

income chargeable to tax under the head "profits and gains of business or profession". The only qualification made by Sub-section(3) of Section

32AB is that the 20% shall be out of the "profits of business or profession" computed in accordance with the requirements of Parts II and III of the

Sixth Schedule to the Companies Act and not in accordance with the Income Tax Act. Here, we may also have a look at Part II of Sixth Schedule

to the Companies Act. This requires the profit and loss account to set out the income and expenditure under different heads separately. It requires

the profit and loss account to show the income from the manufacturing account [Clause 3(ii)(a)], amount of income from investments, distinguishing

between trade investments and other investments [Clause 3(xi) (a)], other income by way of interest specifying the nature of income [Clause 3(xi)

(b)], profits and loss in respect of transactions of a kind, not usually undertaken by the company or undertaken in circumstances of an exceptional

or non-recurring nature, if material in amount (Clause 3 (xii)(b)], miscellaneous income [Clause 3(xii)(c)) etc. separately. It is also provided that the

profit and loss account shall also separately show the net profits. This would indicate that by Sub-section(3) of Section 32AB the Legislature

wanted "profits from business or profession" alone to be included in profits of eligible business or profession but computed in accordance with the

requirements of Parts II and III of the Sixth Schedule to the Companies Act and not the net profits of the Company, including profits from other

sources also, for the purpose of arriving at the 20% deduction allowable u/s 32AB(1).

13. This is all the more so because as per Sub-section(3) of Section 32AB, the profits of eligible business or profession is the amount arrived at

after deducting the depreciation as per Section 32 (1), which deduction is permissible only in respect of depreciation of buildings, machinery, plant

or furniture owned by the assessee and used for the purposes of the business or profession. Obviously, this depreciation cannot be deducted from

rent income, interest income and sundry receipts, or from "income from other sources".

14. The issue is put beyond any doubt by a reading of Clause (b) of Section 3 which says that the profits of eligible business or profession of an

assessee for the purpose of Sub-section(1) shall in case where such separate accounts are not maintained or are not available, be such amount

which bears to the total profits of the business or profession of the assessee after allowing depreciation in accordance with the provisions of Sub-

section(1) of Section 32, the same proportion as the total sales turnover or gross receipts of the eligible business or profession bear to the total

sales, turn over or gross receipts of the business or profession carried on by the assessee. Therefore, the profits of eligible business or profession

should be that of the business or profession carried on by the assessee.

15. According to us, if the word "profits" mentioned in Sub-clause (a) of Sub-section(3) is understood as "profits from business or profession",

there would not be any confusion or ambiguity. If it is read thus all pieces of the puzzle would fall into place and then what is deductible would only

be 20% of the profits and gains of eligible business or profession computed in accordance with the requirements of Parts II and III of the Sixth

Schedule to the Companies Act, 1956. This is further clear from the facts that Sub-section 3(a) states "profits computed in accordance with the

requirements of Parts II and III of the Sixth Schedule to the Companies Act, 1956" and not "net profits computed in accordance with the

requirements of Parts II and III of the Sixth Schedule to the Companies Act. 1956". Parts II and III of the Sixth Schedule to the Companies Act.

1956 relate to "Requirements as to Profit and Loss Account". If the Legislature wanted the "profits of eligible business or profession" u/s 32AB to

be profits or income from all sources, then it was not necessary to couch Sub-section(3) in such elaborate words and phrases, but need have only

said net profits as given in the profit and loss account of the company prepared in accordance with the Companies Act. The fact that the

Legislature took pains to define profits of eligible business or profession in so many words would itself go to show that the Legislature wanted to

restrict its scope to that of profits from the business or profession of the assessee and did not want to include income from all other sources of the

assessee as well.

16. We are of opinion that the decision of the Supreme Court in Apollo Tyres case does not lay down any different law and only supports our

view. This is clear from the statement of law in that decision in relation to Section 32AB, which reads thus:

A perusal of Section 32AB, as it stood at the relevant time, shows that if an assessee has a total income including income chargeable to tax under

the head ""Profits and gains of business or profession"" and if the income from such business is derived from an ""eligible business"" and if the assessee

has out of such income utilised any amount during the previous year for the purchase of new plant or machinery then it is entitled to a set off of a

sum equal to 20 per cent of the profit of such eligible business as computed in the accounts of the assessee which account has been audited in

accordance with Sub-section(5) of Section 32AB.

(Emphasis supplied)

The Supreme Court further held thus:

The dispute in the present case is in regard to the question as to whether the assessee''s investment in the UTI is business, and if so, is it a business

which qualifies to be an ""eligible business"" u/s 32AB? In regard to the first aspect, we must note that the Tribunal as a question of fact based on

material on record has come to the conclusion that the investment in the UTI by the assessee-company is in the course of its business and its

business of manufacture and sale of tyres and sale and purchase of units of the UTI are common in nature and both the business are intertwined

and interlaced. This finding is accepted by the High Court also. We also find that this business of the assessee-company of buying and selling of

units is a business as contemplated u/s 32AB of the Act. The question then is: Is it an eligible business under the said section? The term ""eligible

business"" is defined under Sub-section(2) of Section 32AB. As per that definition, all business of an assessee-company will be an eligible business

unless it falls under the type of business enumerated in Sub-clauses (a) and(b) of Section 32AB(2). It is nobody''s case that this business of the

assessee-company is one of those businesses which fall under business enumerated in Sub-clauses (a) and (b) of Sub-section(2) of Section 32AB.

Therefore, there is no doubt that the business of the assessee-company is an eligible business. The fact that it is shown under a different head of

income would not deprive the company of its benefit u/s 32AB so long as it is held that the investment in the units of the UTI by the assessee-

company is in the course of its ""eligible business"". Therefore, in our opinion, the dividend income earned by the assessee-company from its i n

vestment in the UTI should be included in computing the profits of eligible business u/s 32AB of the Act.

Therefore, we are of opinion that the judgment in Apollo Tyre''s case supports our view. That decision categorically lays down that for the purpose

of computing the benefit u/s 32AB, the eligible business income shall be the income from the business of the assessee itself and not the income from

any other source. The Supreme Court only said that simply because the eligible business income is shown by the company under a different head

of income that would not deprive the company of its benefits u/s 32AB. That does not mean that income shown under other heads of income can

also be taken into account.

17. Counsel have cited before us several decisions, which, according to them, support their contentions, such as Bengal and Assam Investors Ltd.

Vs. Commissioner of Income Tax, West Bengal, , Commissioner of Income Tax Vs. Warren Tea Ltd., , Commissioner of Income Tax Vs. Tamil

Nadu Mercantile Bank Ltd., , Assam Brook Ltd. Vs. Commissioner of Income Tax, , Britannia Industries Ltd. Vs. Joint Commissioner of Income

Tax and Others, . J. Thomas and Co. (P) Ltd. Vs. Commissioner of Income Tax, . Commissioner of Income Tax Vs. Parle Biscuits Ltd., and

Protos Engineering Co. P. Ltd. Vs. Deputy Commissioner of Income Tax, . In view of the conclusion we have arrived at as above, we do not

think it necessary to go into each and every one of the same in detail, since those decisions are decisions of other High Courts not binding on us

either way, except, of course, Bengal and Assam Investors Ltd. ''s case, which is a Supreme Court decision cited by the revenue in support of the

proposition that if a company merely acquires and holds shares with the object of receiving dividends, it does not carry on business within Section

10 and the mere fact that a company is incorporated to carry on investment does not show that it is carrying on that business, which only lends

collateral support to his main contention. However, we note with approval that the Calcutta High Court in the decision in Commissioner of Income

Tax Vs. Warren Tea Ltd., has taken the same view as ours. We shall extract the relevant portion from that judgment:

Sub-section (1) of Section 32 AB provides that a sum equal to 20 per cent of the profits of business or profession as computed in the accounts of

the assessee audited in accordance with Sub-section (5) is allowable. Even in the section itself, as quoted above, the words are given, ""Profits and

gains of the business or profession"". From a perusal of the records it shows that the assessee is the owner of the tea gardens and it derives income

from selling tea leaves. The investment in the shares is not a business of the assessee. The deduction u/s 32AB is allowable only on the basis of

profit from ""business or profession"" and not from the income from other sources. When investment in shares is neither a business nor a profession

of the assessee, the dividend income received from those shares on account of shares held by the assessee cannot be treated as income from the

business or profession"". In view of the facts in the case in hand, the Tribunal has committed a mistake in directing to allow the deduction to the

assessee u/s 32AB, on the dividend income.

18. In view of what is stated in paragraph 16 as above, we are unable to agree with the view expressed in Commissioner of Income Tax Vs. Kil

Kothagiri Tea and Coffee Estate Co. Ltd., and we overrule the same. Consequently, we hold that the assessee is not entitled to deduction of the

rent income, interest income and sundry receipts income as profits of eligible business or profession for computing the deduction u/s 32AB.

In the result, we answer the question in the affirmative i.e. in favour of the revenue and against the assessee. The reference made is disposed of

accordingly.