

(1985) 02 CAL CK 0023

Calcutta High Court

Case No: Income Tax Ref. No. 308 of 1981

MADHU JAYANTI (PVT.) LTD.

APPELLANT

Vs

COMMISSIONER OF INCOME
TAX.

RESPONDENT

Date of Decision: Feb. 5, 1985

Acts Referred:

- Income Tax Act, 1961 - Section 256(2), 35B(1)(b), 35B(1)(b)(iii), 35B(1)(b)(vi), 35B(1)(b)(viii)

Citation: (1985) 48 CTR 151

Hon'ble Judges: Dipak Kumar Sen, J; Ajit K. Sengupta, J

Bench: Full Bench

Judgement

Ajit K. Sengupta, J. - This reference at the instance of the assessee is under s. 256(2) of the IT Act, 1961.

2. The assessment year involved is 1975-76. The assessee was a grower and manufacture of tea, besides exporting the same. Admittedly, the assessee in the original return filed on 30-9-1975 as also in the first revised return filed on 27-5-1976 did not put in any claim for deduction under s. 35B of the Act. In the second return filed on 19-8-1976, the assessee claimed weighted deduction under s. 35B in respect of the following expenditure stated to be export promotion expenses.

(1) Air Freight on Parcel for samples.

(2) Commission paid to agents to obtain order amount to which paid in foreign countries.

(3) Steamer freight on Export Consignments.

(4) Premium to export credit guarantee corp'n.

The ITO allowed weighted deduction in respects of Items 1 and 2 but disallowed the claim of the assessee for weighted deduction in respect of Item Nos. 3 and 4. Such disallowance was made on the ground that no deduction is admissible under s. 35B on Steamer freight and premium to export credit guarantee corporation according to provision of s. 35B(1)(b)(iii). On appeal the AAC upheld the said disallowance.

3. Admittedly, the assessee either in the original return or in the revised return never claimed weighted deduction in respect of the following items of expenditure.

(a) Agency commission

(b) Premium to Export Credit Guarantee Corporation

(c) Inspection & Sampling

(d) Telex charges

(e) Packing expenses.

As such the ITO never considered this aspect of the claim which were raised before the AAC for the first time. The AAC has further upheld the claim of the assessee in respect of these items of expenditure by holding that the assessee was entitled to the weighted deduction in respect of these items.

4. In the appeal by the revenue leading to R.A. No. 937 (Cal) of 1979 it was urged by the departmental representative that the AAC had no jurisdiction to entertain such grounds of appeal in respect of the said items as the said grounds did not arise out of the order of the ITO. Further, there was no evidence or material on record in support of the said claim so as to empower the AAC to admit the said grounds of appeal. This stand of the department was controverted by the assessee. It after due deliberation agreed with the revenue. According to the Tribunal the said grounds do not arise out of the order of the ITO. There was no material or evidence already on record in support of the said grounds.

5. The Tribunal, assuming without admitting that the said grounds could be permitted to be raised has held as under :

"There is no evidence or material on record to prove that the said expenditure has been laid out wholly and exclusively for export promotion and that the said expenditure is covered by cls. (ii), (vi) and (vii) of s. 34B(1)(b) of the Act. The AAC was, therefore, not justified in upholding the said claim of the assessee."

6. On the aforesaid facts the assessee filed a reference being R.A. No. 937 (Cal) of 1979, under s. 256(1) of the IT Act, 1961 :

1. "Whether, on the facts and in the circumstances of the case, there was material and/or evidence before the Tribunal justifying its finding and/or conclusion that the applicant never raised the claim for weighted deduction in respect of items of expenditure viz. (a) Agency commission Rs. 1,500 (b) Premium of Export Credit

Guarantee Corporation Rs. 24,677 (c) Inspection & Sampling Rs. 6,238 (d) Telex charges Rs. 12,037 and Packing charges Rs. 4,62,351 was based on any material and/or evidence of the said finding and/or conclusion is vitiated in law and is unreasonable and/or perverse ?"

2. "Whether, on the facts and in the circumstances of the case, the applicant is entitled in law to weighted deduction under s. 35B(1)(b) of the Act in respect of following items";

(a) Agency commission

(b) Premium to Export Credit guarantee Corpn.

(c) Inspection & Sampling

(d) Telex charges

(e) Packing charges.

3. Whether, the finding and/or conclusion of the Tribunal that there was no material or evidence on record to prove that the items of expenditure in question were covered by the cls. (ii), (vi) and (viii) of s. 35B(1)(b) of the Act or that the said expenses were wholly and exclusively laid out export promotion was justified in law or the same was based on no material and the same is unreasonable and/or perverse ?"

7. At the time of hearing of the said application the Id. counsel for the assessee did not press question No. 1 and as such the Tribunal declined to refer the said question 1. The Tribunal also rejected the question Nos. 2 and 3 on the following ground :

"Coming to questions 2 and 3 in R.A. No. 937 (Cal)/79, these questions are academic as the assessee in the reference application has not challenged the order of the Tribunal as recorded in paragraph 17 of the order that the AAC had no jurisdiction to entertain the ground of appeal in respect of the items detailed in question No. 2. Since that findings of the Tribunal has become final on account of being not challenged it is academic to go to the merits of the points involved in the said ground of appeal. We, therefore, decline to refer the said questions also to the Hon"ble High Court."

8. In pursuance of the direction of this court under s. 256(2) of the IT Act, 1961 the Tribunal referred the following two questions, which are question Nos. 2 and 3 in the said reference application :

"1. Whether, on the facts and in the circumstances of the case the applicant is entitled in law to weighted deduction under s. 35B(1)(b) of the Act in respect of the following items of expenditure :

(i) Agency commission

(ii) Premium to Export Credit Guarantee Corporation.

(iii) Inspection and Sampling

(iv) Telex charges

(v) Packing charges

2. Whether, the finding and or conclusion of the Tribunal that there was no material of evidence on record to prove that the items of expenditure in question were covered by cls. (iii),(vi),(viii) of s. 35B(1)(b) of the Act or that the said expenses were wholly and exclusively laid out for export promotion was justified in law of the same was based on surmises and conjecture or based on no materials and the same is unreasonable and/or perverse ?"

9. We have heard the submissions of the Id. advocates appearing for the parties. In paragraph 17 of the appellate order Tribunal held as follows :

"In the appeal before us departmental representative has urged that the AAC had no jurisdiction to entertain such grounds of appeal in respect of the said items as the said grounds did not arise out of the order of the ITO. Further, there was no evidence or material on record in support of the said claim so as to empower the AAC to admit the said grounds of appeal. This stand of the department is controverted by the assessee. We, after due deliberation agreed with the revenue. The said grounds do not arise out of the order of the ITO. There was no material or evidence already on record in support of the said grounds [Gurjar gravures P. Ltd. (supra)]."

10. In our view the assessee having not pressed question No. 1 in the reference application, which challenged the aforesaid findings of the Tribunal on paragraph 17 of its appellate order, question Nos. 2 and 3 as referred to this court under s. 256(2) do not fall for consideration. This question have become purely academic. In that view of the matter we decline to answer these questions.

11. There will be no order as to costs.

Dipak Kumar Sen, J. - I agree.