

Commissioner of Income Tax, Delhi

Vs

Stepwell Industries Ltd. etc. etc.

(S.C.Sen, Saghir Ahmed JJ)

27.08.1997

ORDER

1. The following question of law came up for consideration before the High Court under Section 256 (2) Income Tax Act, 1961:

"Whether, on the facts and in the circumstances of the case, the I.T.A.T was correct in law in holding that the assessee was entitled to weighted deduction u/s 35B of the Income Tax Act, 1961 in respect of commission payment of Rs. 1,46,678/-?"

2. The High Court declined to entertain this question. Hence this appeal to this court.

3. The assessee's goods were sold by the State Trading Corporation of India Limited to various parties outside India. The assessee claimed weighted deduction under Section 35B(1) (b) (iv). The claim of the assessee is not admissible on these fact. The weighted deduction is allowed for activities carried out wholly and exclusively on the various purposes set out in sub-clauses (i), (ii), (v), (vii), (viii) and (ix) of Section 35B (1) (b). Section 35B allowed at the material time deduction of a sum equal to one third times of the amount of such expenditure incurred during the previous year. In order to get this kind of deduction, the onus lies heavily on the assessee to prove that the expenditure falls within any of the purpose set out in various sub-clauses of Clause (b) of Section 35B (1). Merely because some activities took place outside. India will not qualify the expenditure for the deductions mentioned in Section 35(B). If the State Trading Corporation incurs expenditure for an advertisement or publicity outside India, the assess will not be entitled to any deduction unless the assess 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 course of his business. Likewise, if the State Trading corporation maintains a branch office of agency for the promotion of sale 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 sale outside India of his goods, services facilities, then the assessee will be entitled to a deduction under Section 35B.

4. We are of the view that the High Court should have called for a reference of this question. However, at this stage, there is no point in sending the case back to the High Court. We treat the reference as to have been made to this Court and answer the question in the negative and in favour of the Revenue. There will be no order as to costs. The appeal is allowed. CIVIL APPEAL NO. 3280/1995

5. The following question of the law was sought to be referred to the High Court:

"Whether on the facts and in the circumstances of the case, the Appellate Tribunal was right in law in holding that the amount of Rs. 3,10,750/- paid as commission to M/s. Singh and Co, and HREC is entitled to weighted deduction under Section 35B (1) (b) of the Income Tax Act, 1961?"

6. The question was not referred to the High Court because in the view of the Tribunal the case was concluded by the decision of the Tribunal in M/s. J.Hem Chand & Co. It is difficult to follow the logic of this decision of the Tribunal. When a claim for weighted deduction is made, it is for the assessee to satisfy the Income Tax Officer that the expenditure falls in any of the sub-clause of Clause (b) of Section 35B (1). The onus on the assessee to prove that he is entitled to the weighted deduction allowed under Section 35B.

7. 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 sub-clause (b) of Section 35B (1). 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 the nature mentioned in any one of the sub-clauses. If 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 proved by the assessee.

8. We allow this appeal, set aside the order of the High Court as also the appellate order of the Tribunal. The case is remanded back to the Tribunal. The assessee will have an opportunity to establish his case before the Tribunal to claim deduction. The appeal is disposed of. Civil Appeal Nos. 1465/1981 and 1466/1981

9. The appeals are dismissed. Civil Appeal Nos. 1624-25/1988

10. The following question of law was referred to the High Court by the Tribunal:

"Whether, on the facts and in the circumstances of the case, the assessee is entitled to weighted deduction under Section 35B of the Income Tax Act for the assessment year 1975-76 and 1976-77? Whether on the facts and in the circumstances of the case and

(i) since the foreign buyer had through the Indian agent located the assessee,

(ii) the commission had been paid in India the assessee is entitled to weighted deduction under Section 35B (ii) or (iii) or both"?

11. The expenditure which qualifies for deduction under Section 35B (iii) will have to be the expenditures incurred outside India in connection with distribution, supply or provision outside India of such goods services or facilities. No deduction under Section 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.

12. The next question is whether the assessee is entitled to relief under sub-clause (ii) of Section 35B. Sub-Clause (ii) speaks of "obtaining information regarding market outside India of such goods,

service or facilities". From the facts stated by the Tribunal, it appears that a middleman approached the assessee for purchase of its goods for and on behalf of the foreign buyer. The assessee agreed to sell his goods. The middleman obtained the commission. This does not amount to obtaining information regarding "market outside India of such goods, services or facilities." This is nothing but payment of sales commission to a middleman for the purpose of effecting sales. The foreign buyer located the assessee through the middleman. We are of the view that these appeals have no merit and have to be dismissed. The appeal are dismissed. There will be no order as to costs. Civil Appeal No. 2365/1994

13. The following question of law was sought to be referred:

"1. Whether on the facts and in the circumstances of the case and on a proper interpretation of Section 35B of the Income Tax Act, 1961, the Appellate Tribunal was right in law in allowing full deduction in r/o the following items:

(a) Commission paid to E.C.G.C/H.H.E.C.

(b) Advertisement expenses.

(c) Registration charges for Olympiad-80, and

(d) part of expenses under the head "Director's salary, postage, and telegrams" not incidental to exports?"

2. Whether on the facts and in the circumstances of the case, the Appellate Tribunal was right in law in allowing weighted deduction u/s 35B in respect of packing credit interest?

14. The Tribunal declined to refer this question. The High Court rejected the application under Section 256(2). It appears that the Tribunal did not examine the claim of the assessee by reference to any of the sub-clauses of Section 35B (1) (b). No expenditure can be allowed under Section 35B generally. The assessee must be able to establish the facts to prove that the expenditure falls within the ambit of sub-clause (i) to (ix) of clause (b) of Section 35B (1). This has not been done. We are of the view that the appellate order of the Tribunal has to be set aside. We set aside the order of the High Court as also the appellate order of the Tribunal and remand the case back to the Tribunal. The assessee will have an opportunity of proving the nature of the expenditure and establishing that the expenditure falls within any one of the sub-clauses of Section 35B (1). It has to be remembered that the onus is on the assessee to establish the fact to obtain the deduction claimed. The appeal is allowed with above observations. There will be no order as to costs. Civil Appeal No. 9105 of 1994

15. It appears that the Tribunal did not examine the claim of the assessee by reference to any of the sub-causes of Section 35B (1) (b). No expenditure can be allowed under Section 35B generally. The assessee must be able to establish the facts to prove that the expenditure falls within the ambit of sub-clauses (i) to (ix) of clause (b) Section 35B(1). This has not been done. We are of the view that the appellate order of the Tribunal has to be set aside. We set aside the order of the High Court as also the appellate order of the Tribunal and remand the case back to the Tribunal. The assessee will have an opportunity of proving the nature of the expenditure and establishing that the expenditure falls within any one of the sub-clause of Section 35B(1). It has to be remembered that the onus is on the assessee to establish the facts to obtain the deduction claimed. The appeal is allowed with above observations. There will be no order as to costs. Civil Appeal Nos.2324-26/1995

16. Two questions of law arose for consideration in this case before the High Court:

"R.A.No.17

1. Whether on the facts and in the circumstances of the case, on a proper interpretation of Section 35B, the Appellate Tribunal was right in allowing weighted deduction on total service charges paid to the STC of India amounting to Rs. 7,35,721/- and whether the Tribunal was right in law in allowing weighted deduction on entire service in charges paid to STC when the assessee had claimed weighted deduction only on 2/3rd of service charges paid to STC?

2. Whether on the facts and in the circumstances of the case, the Appellate Tribunal was right in law in allowing weighted deduction to the assessee in respect of expenses such as:

(i) Establishment expenses,

(ii) Rent paid for Karnal Office,

(iii) Rent paid for Delhi Office,

(iv) Car expenses,

(v) Telephone charges,

(vi) Stationery expenses. Which was disallowed by the ITO in toto and the disallowance was confirmed by the CIT(A) but allowed by the Tribunal in the proportion worked out by the Tribunal?

3. Whether on the facts and in the circumstances of the case, on a proper interpretation of Section 40A (3), the Appellate Tribunal was right in law in vacating the addition of Rs. 3,500/- made by the ITO by invoking the provisions of Section 40A(3) of the Act in respect of payment of Rs. 2,000/- and Rs.1,500/- made on 25.2.1978 to M/s. Leather Products, Jagdishpura. R.A.No.18 Whether on the facts and in the circumstances of the case, on a proper interpretation of Section 35B, the Appellate Tribunal was right in law in affirming the order of the CIT (A) allowing weighted deduction on 50% of service charges paid to STC of India amounting to Rs.7,35,721?"

17. The High Court declined to call a reference of these questions. We are of the view that the High Court was clearly in error. Questions of law arose out of the order of the Tribunal. We are of the view that the Tribunal was not right in allowing weighted deduction without investigating the facts and examining the law applicable. There is no point in calling for a reference of this case at this stage. The Tribunal must examine the case afresh in the light of the observations made in C.A.No 2365/94. The onus is on the assessee to prove that he was entitled to the expenditure by reference to various sub-cause of Section 35B (1) (b). The expenditures cannot generally be allowed as claimed. We set aside the order of the High Court as also the appellate order of the Tribunal. The appeals are allowed. No order as to costs. Civil Appeal No.3200 of 1995

18. It appears that the Tribunal did not examine the claim of the assessee by reference to any of the

sub-clause of Section 35B(1)(b). No expenditure can be allowed under Section 35B generally. The assessee must be able to establish the facts to prove that the expenditure falls within the ambit of sub-clauses (i) to (ix) of clause (b) of Section 35B (1). This has not been done. We are of the view that the appellate order of the Tribunal has to be set aside. We set aside the order of the High Court as also the appellate order of the Tribunal and remand the case back to the Tribunal. The assessee will have an opportunity of proving the nature of the expenditure and establishing that the expenditure falls within any one of the sub-clause of Section 35B. It has to be remembered that the onus is on the assessee to establish the fact to obtain the deduction claimed. The appeal is allowed with above observations. There will be no order as to costs. Civil Appeal No. 3201/95

19. In the case, the Tribunal was wrong in allowing the deduction claimed without examining the facts. The High Court was also wrong in not calling for a reference. The order of the High Court is set aside. The appellate order of the Tribunal is also set aside. The appeal is allowed. The assessee can satisfy the Tribunal by giving particulars that the expenditure was of such a nature as falls in any of the sub-clause of Section 35B (1) (b). Civil Appeal No.3973/95

20. The Tribunal was wrong in allowing the claim of the assessee for weighted deduction under Section 35B without going into the facts of the case. The claim was not made before the Income Tax Officer or the Appellate Assistant Commissioner. No particulars of the expenditures were furnished to them. The particulars should have been placed before the ITO or the Appellate Assistant Commissioner for examination. The onus of proving the facts and getting the benefit of the deduction lies on the assessee. The assessee not having proved anything either before the ITO or the Appellate Assistant Commissioner cannot get this deduction. The Tribunal cannot allow the claim on assumption of facts.

21. The Tribunal was also in error in not referring the following question of law sought to be raised to the High Court:

"(i) Whether on the facts and in the circumstances of the case, the Appellate Tribunal was right in law in admitting assessee's additional grounds claiming weighted deduction under Section 35B of items of which no claim has been made before the Income Tax Officer or before the Commissioner of Income Tax (Appeal)?

(ii) Whether on the facts and in the circumstances of the case, the Appellate Tribunal was right in law in allowing weighted deduction under Section 35B in respect of packing credit interest for which there has been no claim before the lower authorities?

(iii) Whether on the facts and in the circumstances of the case on a proper interpretations of Section 35B of the Income Tax Act, 1961, the Appellate Tribunal was right in law in allowing weighted deduction on whole of the E.C.G.C. charges?"

22. The High Court was also in error in not calling for a reference in this case.

23. In the case of Addl. Commissioner of Income Tax, Gujarat Vs. Gujargravures Pvt. Ltd.-111 I.T.R. 1, this Court held that a claim not made under Section 84 was neither made before the Income Tax Officer nor before the Appellate Commissioner, the Tribunal was not right in entertaining that claim and allowing it in favour of the assessee.

24. In view of the the above facts, we are of the opinion that the decision of the Tribunal was

erroneous and the same is set aside. The appeal is allowed, there will be no order as to costs. Civil Appeal No. 4106 of 1995

25. The appeal is dismissed. There will be no order as to costs. Civil Appeal No. 6411 of 1995

26. The Tribunal overlooked that in order to qualify for deduction the expenditures must have been wholly or exclusively incurred for the purposes mentioned in sub-clause (b) of Section 35B (1). The order of the High Court under appeal is set aside. The appellate order of the Tribunal is also set aside. The appeal is allowed. Civil Appeal No. 6715 of 1995

27. The following question of law was sought to be referred to the High Court:

"Whether on the facts and circumstances of the case, the I.T.A.T. was right in law in allowing weighted deduction u/s, 35B in respect of Rs. 29,746/- paid as export agency commission to ECGC?"

28. The Tribunal declined to refer the question. The High Court rejected the application. Our attention was drawn that the question sought to be raised before the High Court under Section 256(2) was differently worded. But the High Court could have referred the question. The Tribunal should not have declined to refer the question to the High Court under Section 256 (1).

29. In view of our earlier decisions, this case is remanded back to the Tribunal for decision in accordance with the directions given earlier. The order of the High Court is set aside. The appellate order of the Tribunal is also set aside. The appeal is allowed. There will be no order as to costs. C.A.No. 6941/95

30. In view of the principles laid down in the aforesaid cases, the order under appeal passed by the High Court is set aside. The appellate order of the Tribunal is also set aside.

31. The appeal is disposed of. There will be no order as to costs. Civil Appeal Nos. 8044-8045/95

32. The following questions of law arise in this case:

"1. Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in holding that the assessee was entitled to weighted deduction u/s. 35B on the expenditure incurred by it under the heads "Customs Duty" Repairs and re-assembly, clearing and storage and certain expenditure incurred by foreign branches?

2. Whether on the facts and in the circumstances of the case, Tribunal was right in law in holding that the assessee was entitled to weighted deduction under Section 35B on the expenses which were general in nature and thus not covered under any of the clauses of Section 35B?

33. The finding of fact by the Tribunal is that most of the expenditures were of customs duty paid for sending the goods by the Indian party to its foreign branches. Whether the foreign branches paid the duty or the Indian branch paid the duty, is quite immaterial. The transaction was internal transactions of sending goods by the Company to its own branches abroad. In that view of the matter, we set aside the order of the High Court as well as the appellate order of the Tribunal.

34. The appeals are allowed. There will be no order as to costs. Civil Appeal No. 8482/95

35. The Revenue has not advanced any argument except on question No. 1 which is as under:

"1. Whether on the facts and circumstances of the case, and on a proper interpretation of Section 35B of the Income Tax Act, 1961, the Appellate Tribunal was right in law in allowing further weighted deduction in respect of expenses under various heads including "Travelling", "Service charges/commission to various Agencies", "Expenses on Foreign Delegation in India, "Bank Interest on packing Credit", "subscriptions" "Commission and Brokerage" and on proportionate expenses under other heads like "salary", "Telex, Telephone and Telegram", "postage", "printing" and Stationery", "Electricity", "Jamnagar Office Expenses", "Bank Charges" etc.?"

36. The Tribunal was clearly in error in allowing this claim for weighted deduction without examining the claim, the assessee has also failed to adduce any proper findings and make out a proper case under Clause (b) of Section 35B (1). In that view of the matter, we are of the opinion that the Tribunal was in error in not referring the question of law to the High Court. The High Court was in error in not calling for a reference. There is not point in directing reference at this stage. We hold that the Appellate Tribunal's decision in regard to Section 35B was erroneous. We set aside the order of the High Court. We also set aside the appellate order of the Tribunal.

37. The appeal is allowed to the above extent. There will be no order as to costs. C.A.No. 8790/95

38. This case relates to payment of commission to S.T.C. and H.H.E.C. by the assessee Company. The admissibility of this expenditure under Section 35B will depend upon the facts of the case. The assessee will have prove the facts to bring it within the compass of various sub-clause of clause (b) of Section 35B (1). The Tribunal has not examined this case properly at all. The assessee has also not proved his case in any way. Under these circumstances, we set aside the order of the Tribunal and send the case back to the Tribunal to decide it in accordance with law. The order of the High Court under appeal is set aside. The appellate order of the Tribunal is also set aside. The appeal is disposed of. There will be no order as to costs. C.A.No. 9835 of 1995

39. This case relates to weighted deductions. No question of law was referred to the High Court. The High Court also did not call for reference. The order of the High Court is clearly erroneous and is set aside. The appellate order is also set aside. The Tribunal will examine the case afresh. There will be an opportunity given to the assessee to prove that the claim of weighted deductions were for activities falling within the sub-clause of clause (b) of Section 35B (1).

40. The appeal is disposed of. There will be no order as to costs. Civil Appeal No. 2293 of 1996.

41. The appeal is dismissed.