

Arvinda Paramila Works

Vs

Commissiner of Income Tax

Civil Appeal No. 11366 of 1995

(S.P. Bharucha, R.C. Lahoti JJ)

31.03.1999

JUDGMENT

S.P. Bharucha, J

1. The question in this appeal is whether payment of commission to an agent abroad is maintenance of an agency within the meaning of Section 35B(1)(b)(iv) of the Income Tax Act, 1961. The High Courts have taken divergent views.

2. We are concerned with the Assessment Year 1981-82. The assessee manufactured agarbathis. It had exported agarbathis during the year under consideration. It had paid commission to agents outside India who had procured orders. It claimed weighted deduction under the afore-mentioned provision in respect of such expenditure of Rs. 13,23,225/-. It was disallowed by the Assessing Authority. The Commissioner of Income Tax (Appeals) took a contrary view. The Income Tax Appellate Tribunal held that the Commissioner (Appeals) was not justified in allowing the said weighted deduction. From out of the judgment and order of the Tribunal, the following question was referred to the High Court for its considerations.

"Whether on the facts and in the circumstances of the case, the Tribunal was justified in holding that the applicant was not entitled to the weighted deduction under S.35B (1)(b)(iv) of the Act, in respect of the commission payments made to agents outside India ?"

The High Court answered the question in the affirmative and in favour of the Revenue, following its earlier decision in *Chief Commissioner of Income Tax v. Mysore Sales International Ltd., 195 ITR 457*. The assessee is in appeal by special leave.

3. Section 35B states that where an assessee, who is resident in India, has incurred, directly or in association with any other person, any expenditure referred to in clause (b) thereof, he would be allowed a deduction of a sum equal to be one and one-third times the amount of such expenditure incurred during the previous year. So far as is relevant clause (b) reads :

"the expenditure referred to in clause (a) is

that incurred wholly and exclusively on -

(i) .....

(ii) .....

(iii) .....; and

(iv) maintenance outside India of a branch, office or agency for the promotion of the sale outside India of such goods, services or facilities;

....."

4. The question, therefore, is whether the commission that the assessee had paid to agents outside India who had procured orders was expenditure on the maintenance outside India of agencies for the promotion of the sale outside India of its agarbathis.

5. The High Court noted the contention on behalf of the assessee that the expression 'agency' would include even a single agent and observed that this would have been relevant if it was shown that the establishment of the agency outside the country had been maintained by the assessee, but there was no material placed before the Tribunal or any of the authorities concerned for claiming that an agency had been maintained by the assessee.

6. In *Chief Commissioner of Income Tax v. Mysore Sales International Ltd.* 195 ITR 457 the Karnataka High Court took the view that the word 'agency' in the aforesaid provision had to be read ejusdem generis with the expression 'branch' and 'office' used in the said provision. The meaning attributable to 'agency' would, therefore, have to be something which had some flavour resembling that of a branch or office. That apart, the assessee had to maintain such agency for it was only such expenditure which could fall within the ambit of the said clause. The word 'maintenance' could not be equated with the concept of payments made depending on the actual work turned out. It indicated that, irrespective of the work turned out, the agency was maintained for its upkeep or preservation or sustenance; this alone could be termed as maintenance of an agency. Emphasis was also placed upon the opening words which required that the expenditure should be incurred wholly and exclusively on the activities mentioned in the sub-clauses. Therefore, it was held that the maintenance of the agency for sale promotional purposes alone was covered by the relevant words of sub-clause (iv) and such expenditure should be entirely incurred for that purpose. In the case before the High Court, the commission had included remuneration for the agent for procuring a particular sale and, it was therefore, held to fall outside the ambit of Section 35B.

7. The High Court of Calcutta *C.I.T. v. Usha Telehoist Ltd.*, 212 ITR 177 dissented from the view taken by the Karnataka High Court in the case afore-mentioned. It observed that the principle of ejusdem generis applied only where the mention of specific items of the same genus was followed by an expression of residuary nature pertaining to the same genus. In its view, 'agency' was an expression of which the content had nothing to do with the proceeding words, 'office' or 'branch'. If the assessee had an agency abroad "that agency cannot refer to any independent establishment of the assessee being maintained abroad because agency always connotes the independence of the agent." The requirement of the provision was sufficiently satisfied "if there is an agent outside who promotes the sales of the assessee's exports."

8. The High Court at Gauhati in *Commissioner of Income Tax v. Assam Frontier Tea Ltd.*, 224 ITR 398 has followed the Calcutta High Court without assigning any independent reasons.

9. The Kerala High Court in *Commissioner of Income Tax v. Pooppally Foods*, 161 ITR 729 has taken the same view as the Calcutta High Court, but there is no discussion of the provision, apparently because the Revenue had never before chosen to raise the point that the expenditure there

concerned would not fall within the ambit of the clauses in Section 35.

10. The Gujarat High Court in *Commissioner of Income Tax v. Cadila laboratories (P) Ltd.*, 221 ITR 35 referred to the meaning of the word 'agency' as found in Haslbury's laws of England. It is there stated that "the terms 'agency' and 'agent' have in popular use a number of different meanings, but in law the word 'agency' is used to connote the relation which exists when one person has an authority or capacity to create legal relations between a person occupying the position of principal and third parties." In the case before the Gujarat High Court, the expenditure had been incurred for payment of commission to agents in foreign countries for the purpose of promotion of sale without India and, in the High Court's view, that would "certainly be the amount of expenditure incurred wholly and exclusively for the promotional sales outside India on maintenance of agency outside India."

11. What is required is an analysis of the provisions of Section 35B (1)(b)(iv). The expenditure that is referred to therein has to be incurred on the maintenance outside India of a branch, officer or agency should be for the promotion of sales outside India of the assessee's goods, services or facilities. When payment is made, as here, by an assessee of commission to agents outside India who had procured orders, the requirements of clause (iv) are far from satisfied. There is, in the first place, no maintenance by the assessee of the agency. Secondly, the expenditure has to be incurred on the promotion of sales of the assessee's goods outside India. When expenditure is incurred by way of payment of commission on particular sales, that is not expenditure on the promotion of the assessee's sales in general.

12. While we think that there is some merit in the observation of the Karnataka High Court that the words "branch, officer or agency" in the clause draw colour from each other and that the word 'agency' should, therefore, be interpreted in the light of the words 'branch' and 'office', it is, in any event, very clear that even if the agency is an agency established not by the assessee but by a third party, the agency must be maintained by the assessee.

13. In the result, we uphold the view taken by the Karnataka High Court in the judgment and order under appeal and dismiss the appeal with costs.