

CALCUTTA HIGH COURT

Commissioner of Income Tax

Vs

Union Carbide India Ltd

(Dipak Kumar Sen, J.)

03.06.1986

JUDGEMENT

Dipak Kumar Sen, J.

(1.) THIS consolidated reference arises out of the assessment of Union Carbide India Ltd., the assessee, to income-tax in the assessment years 1973-74 to 1975-76. On an application of the Revenue under Section 256(1) of the Income-tax Act, 1961 (" the Act"), the following question has been referred as a question of law arising out of the order of the Tribunal in the assessment year 1975-76 for the opinion of this court: " 1. Whether the Tribunal was justified in holding that capital work-in-progress in the industrial undertaking Electrolytic Manganese Company, should be included in the computation of 'capital employed' for the purpose of the relief under Section 80J of the Income-tax Act, 1961 ? "

(2.) ON an application of the assessee under Section 256(1), the following questions have been referred as questions of law arising out of the orders of the Tribunal for the opinion of this court: For the assessment year 1974-75 : "2. Whether, on the facts and in the circumstances of the case, the Tribunal erred in holding that while computing the capital for the purpose of relief under Section 80J, the accrued proportionate interest on borrowed capital has to be excluded in view of the fact that the retrospective nature of the amendment of the Finance Act, 1980, has been challenged before the Hon'ble Supreme Court ? 3. Whether, on the facts and in the circumstances of the case, the Tribunal was right in confirming the Income-tax Officer's action to deduct 'proportionate interest accrued in respect of borrowed funds' while computing the capital employed for the purposes of Section 80J, vide his order dated October 31, 1977, giving effect to the orders of the Commissioner of Income-tax under Section 263, dated January 20, 1976, and of the Appellate Tribunal, dated May 13, 1977, when no such direction was given by the Commissioner of Income-tax or the Tribunal in their aforesaid orders ?" For the assessment year 1975-76: " 4. Whether, on the facts and in the circumstances of the case, the Tribunal erred in holding that while computing the capital for the purpose of relief under Section 80J, the accrued proportionate interest on borrowed capital has to be excluded in view of the fact that the retrospective nature of the amendment of the Finance Act, 1980, has been challenged before the Hon'ble Supreme Court ? 5. Whether, on the facts and in the circumstances of the case, the Tribunal was right in confirming the Income-tax Officer's action to deduct 'proportionate interest

accrued in respect of borrowed funds' while computing the capital employed for the purposes of Section 80J, vide his order dated October 31, 1977, giving effect to the order of the Appellate Assistant Commissioner, dated June 27, 1977, when no such direction was given by the Appellate Assistant Commissioner ?" For the assessment years 1973-74 and 1974-75 : " 6. Whether, on the facts and in the circumstances of the case, the Tribunal erred in not admitting the grounds relating to the computation of capital employed in several industrial undertakings taken before the Tribunal in cross-objections as an aspect of the computation of capital employed in the matter of allowing relief under Section 80J already considered by the Commissioner of Income-tax (Appeals) in his order dated October 28, 1978, and the plea raised in this behalf was purely one of law involving no further investigation ? " On the question referred at the instance of the Revenue for the assessment year 1975-76, it has been found that the assessee set up a new industrial undertaking called " Electrolytic Manganese Company " in the relevant assessment year. The Income-tax Officer excluded the value of the capital work-in-progress in respect of the said undertaking in the relevant assessment year on the ground that on the basis of average, capital work-in-progress prior to its installation had to be excluded from the value of the assets. The Commissioner (Appeals) accepted the contention of the assessee and the matter thereafter came up before the Tribunal by way of further appeal by the Revenue. The Tribunal held that the controversy was covered by a decision of this court in *CIT v. Indian Oxygen Ltd*¹. and following the said decision upheld the order of the Commissioner (Appeals). At the hearing before us, it was submitted by the learned advocate for the Revenue that for the purpose of being included in the capital employed, the same should be shown to have been employed on the first day of the accounting year. He drew our attention to the assessment order where it had been noted by the Income-tax Officer that in respect of the said Electrolytic Manganese Company, the opening capital work-in-progress had been installed during the year. The learned advocate submitted that in the aforesaid facts, following the decision of the Supreme Court in *Lohia Machines Ltd. v. Union of India*², it should be held that the Tribunal was not justified in holding that the capital work-in-progress in the new industrial undertaking should be included in the computation of the capital employed.

(3.) THE learned advocate for the assessee contended, on the other hand, that whether the capital work-in-progress had been employed on the first day of the accounting period was a question of fact and the same has not been disputed or agitated by the Revenue up till now. It was submitted that this court sitting in its advisory jurisdiction should not enquire into facts not on record. It was submitted that this factual aspect of the question was never raised or agitated in any of the earlier proceedings. The controversy which was raised before the Tribunal undoubtedly is covered by the said decision of this court in *Indian Oxygen Ltd.*'s case [1978] 113 ITR 109 and, therefore, it could not be said that the Tribunal was not justified in holding that the capital work-in-progress had to be taken into account in computing the capital for the purpose of Section 80J of the Act. It is not established from the facts on record that such capital had not been employed on the first day of the accounting period. ;
Cases Referred.

1[1978] 113 ITR 109

2[1985] 152 ITR 308