BOMBAY HIGH COURT

Commissioner of Income Tax

Vs

Shah Construction Company Limited

(B.P.Saraf, J.)

31.07.1997

JUDGEMENT

B.P.Saraf, J.

(1.) BY this reference under S. 256(1) of the IT Act, 1961, the Tribunal has referred the following questions of law to this Court for opinion at the instance of the Revenue : "1. Whether, on the facts and in the circumstances of the case, the business of construction of industrial undertaking is by itself not eligible to investment allowance under S. 32A(2)(b)(iii)? 2. Whether, on the facts and in the circumstances of the case, and in law, the Tribunal was right in holding that the business of construction carried on by the assessee is an industrial undertaking ? 3. Whether, on the facts and in the circumstances of the case and in law, the assessee's business activity is also business of constructing of 'thing' to be entitled to investment allowance under s. 32A(2)(b)(iii) ? 4. Whether, on the facts and in the circumstances of the case and in law, the Tribunal was right in holding that the dumpers used by the assessee in the execution of civil engineering contract work were not 'road transport vehicles' so as to fall within the proviso (b) to S. 32A(1) and granting investment allowance ? 5. Whether, on the facts and in the circumstances of the case and in law, the Tribunal was right in holding that service charges amounting to Rs. 2,81,331 has not accrued to the assessee in terms of Protocol I and II on the ground that the claim for deduction of this amount in the hands of payer firm, Builders International (India) Ltd., has been disallowed and the payee firm has been assessed at loss ?"

(2.) COUNSEL for the Revenue submits that the controversy in questions Nos. 1 to 4 now stands concluded in favour of the Revenue by the decision of the Supreme Court in *CIT vs. N.C. Budharaja & Co*[1]. Following the same, all these four questions are answered in the negative and in favour of the Revenue. The only question left for our consideration is question No. 5. The controversy pertains to the asst. year 1980 81, the relevant previous year being the year ended 30th June, 1979. The assessee is a company engaged in the business of construction. During the above asst. year 1980 81, a sum of Rs. 2,81,331 was receivable by the assessee as service charges from Builders International (India) Ltd. The controversy is whether, on the facts and in the circumstances of this case, it could be regarded as the income of the assessee for the purposes of income tax. The material facts giving rise to this controversy are as follows : By an agreement of partnership dt. 6th Jan., 1977, called "Protocol", the assessee was entitled to service charges

calculated at the rate of five per cent. of contract value. By another agreement dt. 3rd June, 1980, Protocol No. III, which is stated to be in supersession of the earlier Protocol, it was provided that the agreement for payment of professional fees for rendering services as leader should be treated as cancelled as if it never existed and before making up the final accounts of profit or loss of the transaction, each of the partners would be entitled to two per cent. of the total contract value payable by the purchasers for the project since all the partners were agreed to be actively engaged in the execution of the project, and such fees should be debited to the P & L a/c as an expenditure and the resultant profit or loss should be apportioned amongst the partners as per cl. (iv) of the partnership deed dt. 6th Jan., 1977. The assessee claimed that in view of the above agreement dt. 3rd June, 1980, the amount of Rs. 2,81,331 receivable by it from builders International (India) Ltd. should not be included in its income. The ITO did not accept this claim of the assessee. While doing so, the ITO pointed out that as the agreement was effective from 3rd June, 1980, it could not apply to the service charges received or receivable in the year ending 3rd June, 1979. On appeal, the CIT(A) upheld the order of the ITO. The assessee appealed to the Tribunal. Before that, it appears that none of the facts stated above were disputed by the assessee nor the findings of the ITO or the CIT(A) were challenged. The only ground of the assessee before the Tribunal in support of its claim was that in the assessment of Builders International (India) Ltd., the management fees having been disallowed by the Department, it could not be included in the case of the assessee. The Tribunal accepted the above contention of the assessee and held that the amount of service charges receivable by the assessee could not be included in its income. Hence, this reference at the instance of the Revenue.

(3.) WE have carefully perused the facts of the case and the order of the Tribunal. We, however, find it extremely difficult to uphold the order of the Tribunal. It is clear from the order of the Tribunal that there is no dispute about the fact that the amount of Rs. 2,81,731 was receivable by the assessee as service charges under the agreement dt. 6th Jan., 1977, with the Builders International (India) Ltd. The fact that the agreement was superseded or modified by the agreement dt. 3rd June, 1980, subsequent to the accrual of the income, is also not in dispute. Nor is it the case of the assessee that the amount in question was not receivable. That being so, the amount which was receivable in the previous year as service charges is the income of the assessee for that year. The fact that the amount receivable by the assessee has not been allowed as a deduction in the assessment of the party from whom it was receivable is not relevant in deciding the question whether the income accrued to the assessee or not. So far as the assessee is concerned, obviously the amount of Rs. 2,81,331 was receivable as service charges from Builders International (India) Ltd. in the previous year relevant to the assessment year under reference. If that is so, there is no reason to hold that it was not includible in the assessee's income. The allowance or disallowance of the same in the hands of the payer is of no relevance in deciding the taxability of the same in the hands of the recipient. In view of the above, we are of the clear opinion that the Tribunal was not justified in holding that the service charges amounting to Rs. 2,81,331 did not accrue to the assessee merely because the claim for deduction of the same in the hands of the payer was disallowed by the IT authorities. Question No. 5 is, therefore, answered in the negative, i.e., in favour of the Revenue. This reference is disposed of accordingly with no order as to costs. ;

Cases Referred.

1(1993) 114 CTR (SC) 420 : (1993) 204 ITR 412 (SC) : TC 25R.185