BOMBAY HIGH COURT

Commissioner of Income-Tax

Vs

Elpro International Ltd

(S Desai, C.J. V Kotwal, J.)

06.10.1988

JUDGMENT

Desai, J.

1. Four questions have been referred to us by the Income-tax Appellate Tribunal Bombay Bench "B", under section 256(1) of the Income-tax Act, 1961. The reference was made at the instance of the Revenue and the assessee had not filed a reference application. This fact is important when we consider question No. (3) referred to us.

2. The four questions referred to us are as under:

> "(1) Whether depreciation can be granted on the cost of construction of roads on the footing that roads are part of the factory building ?
>
> (2) If the answer to question No. (1) is in the negative, then whether depreciation is allowable on the cost of roads on the footing that the roads constitute 'plant' ?
>
> (3) Whether, on the facts and in the circumstances of the case, the following items were not includible in the capital for the purpose of relief/deduction under section 84/80J for the assessment year 1967-68 ?
>
> Machinery in transit Rs. 17,139
> Work-in-progress Rs. 65,497
> Unallocated capital expenditure Rs. 9,225
>
> (4) Whether, on the facts and in the circumstances of the case, the following items are includible in capital for purposes of working out the relief under section 80J for the assessment year 1968-69 ?
>
> 1. Value of work-in-progress Rs. 65,497

2. Value of unallocated capital expenditure Rs. 9,225."

3. Of these four questions, questions Nos. (1),(2) and (4) arise from the appellate order wherein the decision was against the Revenue and it was the Revenue which had sought reference in respect of these three questions, howsoever, as far as the computation of capital for the purpose of relief/deduction under section 84/80J for the assessment year 1967-68 is concerned, the decision of the Tribunal went against the assessee and the Tribunal held that the Appellate Assistant Commissioner was not right in including those three items in the computation of capital. This was done on the basis of applying the express phraseology to be found in rule 19 of the Income-tax Rules, 1962 which was operative during the said assessment year, the said rule required the asset acquired after the first date to be used during that year for the purpose of making necessary computation and the Tribunal was of the opinion that since these amounts could not refer to any asset which could be said to have been used during the year the amounts cannot be taken into account for the purpose of making the capital computation.

4. As far as question No. (3) is concerned, Shri Jetley has submitted that it was not permissible to include this question in the reference application at the instance of the Revenue. In this connection, he drew our attention to the observations of the Supreme Court in CIT v. V. Damodaran . The observations are specific and unequivocal. It was not open to the assessee to seek a reference of a question of law in the reference application filed by the other party, Only in a limited category of cases indicated in Damodaran's case , is this permissible and this is not one of those categories. Hence, we will have to refrain from answering question No. (3) referred to us on the ground that the reference was incompetent. The result will be that the decision of the Tribunal which is against the assessee will stand.

5. As far as the other questions are concerned. An elaborate discussion is not needed, as far as question No. (1) is concerned, the answer to be given is concluded by a decision of this High Court in *CIT v. Colour-Chem Ltd*[1]. which decision has been subsequently followed by this High Court in a number of matters. In accordance with the said decision, therefore, we answer question No. (1) in the affirmative and in favour of the assessee.

6. In view of this answer, we are not required to answer question No. (2).

7. This brings us to a consideration of question No. (4) Section 80J of the Income-tax Act, 1961, and rule 19A of the Income-tax Rules, 1962 came to be directly considered by a Division Bench of this High Court in *CIT v. Advani Oerlikon Pvt. Ltd*[2]. In accordance with that decision, question No. (4) is required to be answered in the affirmative and in favour of the assessee.

8. In passing, we may add that Advani Oerlikon's case [1985] 161 ITR 449 (Bom)(Supra) has

followed the previous decision of this High Court in *CIT v. Alcock Ashdown and Co. Ltd*[3]. in which the Division Bench had followed the decision of the Calcutta High Court in *CIT v. Indian Oxygen Ltd*[4]. In the earlier decision, the court was directly concerned with rule 19 which was applicable for the assessment year 1967-68. Thus, had the assessee sought a reference and question No. (3) which we have refrained from answering by reason of the decision of the Supreme Court, had been referred to the High Court at the instance of the assessee on its application for reference, the assessee might have been entitled to succeed even in respect of the point decided against it by the Income-tax Appellate Tribunal and covered by question No. (3). However, we are precluded by the observations of the Supreme Court and are, therefore, constrained from giving an answer to question No. (3).

9. The parties to bear their own costs of the reference

Cases Referred.

1[1977] 106 ITR 323
2[1986] 161 ITR 449
3[1979] 119 ITR 164
4[1978] 113 ITR 109