IN THE HIGH COURT OF DELHI AT NEW DELHI

ITR No 75 of 1986

Reserved on: October 3, 2007

12.10.2007

Date of Decision: October 12, 2007

COMMISSIONER OF INCOME TAX ....Petitioner

Through : Ms. Rashmi Chopra, Advocate.

versus

ANIL KUMAR BISHNOI ....Respondent

Through: S/Shri D.N. Sawhney with

M.P. Rastogi and K.N. Ahuja,

Advocates.

ITR No. 112 of 1991

COMMISSIONER OF INCOME TAX ....Petitioner

Through : Mr. J.R. Goel, Advocate.

versus

AJIT KUMAR BISHNOI ....Respondent

Through: S/Shri D.N. Sawhney with

M.P. Rastogi and K.N. Ahuja,

Advocates.

ITR No. 180 of 1991

COMMISSIONER OF INCOME TAX ....Petitioner

Through : Mr. J.R. Goel, Advocate.

versus

M/S S.L.B. EXPORTS ....Respondent

Through: S/Shri D.N. Sawhney with

M.P. Rastogi and K.N. Ahuja,

Advocates.

ITR No. 181 of 1991

COMMISSIONER OF INCOME TAX ....Petitioner

Through : Mr. J.R. Goel, Advocate.

versus

M/S S.L.B. EXPORTS ....Respondent

Through: S/Shri D.N. Sawhney with

M.P. Rastogi and K.N. Ahuja,

Advocates.

? ITR No. 182 of 1991

COMMISSIONER OF INCOME TAX ....Petitioner

Through : Mr. J.R. Goel, Advocate.

versus

M/S S.L.B. EXPORTS ....Respondent

Through: S/Shri D.N. Sawhney with

M.P. Rastogi and K.N. Ahuja,

Advocates.

ITR No. 194 of 1991

COMMISSIONER OF INCOME TAX ....Petitioner

Through : Mr. J.R. Goel, Advocate.

versus

AJIT KUMAR BISHNOI ....Respondent

Through: S/Shri D.N. Sawhney with

M.P. Rastogi and K.N. Ahuja,

Advocates.

ITR No. 195 of 1991

COMMISSIONER OF INCOME TAX ....Petitioner

Through : Mr. J.R. Goel, Advocate.

versus

AJIT KUMAR BISHNOI ....Respondent

Through: S/Shri D.N. Sawhney with

M.P. Rastogi and K.N. Ahuja,

Advocates.

ITR No. 196 of 1991

COMMISSIONER OF INCOME TAX ....Petitioner

Through : Mr. J.R. Goel, Advocate.

versus

AJIT KUMAR BISHNOI ....Respondent

Through: S/Shri D.N. Sawhney with

M.P. Rastogi and K.N. Ahuja,

Advocates.

ITR No. 197 of 1991

COMMISSIONER OF INCOME TAX ....Petitioner

Through : Mr. J.R. Goel, Advocate.

versus

AJIT KUMAR BISHNOI ....Respondent

Through: S/Shri D.N. Sawhney with

M.P. Rastogi and K.N. Ahuja,

Advocates.

ITR No 269 of 1991

COMMISSIONER OF INCOME TAX ....Petitioner

Through : Mr. J.R. Goel, Advocate.

versus

ANIL KUMAR BISHNOI ....Respondent

Through: S/Shri D.N. Sawhney with

M.P. Rastogi and K.N. Ahuja,

Advocates.

ITR No 115 of 1994

COMMISSIONER OF INCOME TAX ....Petitioner

Through : Mr. J.R. Goel, Advocate.

versus

AJIT KUMAR BISHNOI ....Respondent

Through: S/Shri D.N. Sawhney with

M.P. Rastogi and K.N. Ahuja,

Advocates.

ITR No 116 of 1994

COMMISSIONER OF INCOME TAX ....Petitioner

Through : Mr. J.R. Goel, Advocate.

versus

AJIT KUMAR BISHNOI ....Respondent

Through: S/Shri D.N. Sawhney with

M.P. Rastogi and K.N. Ahuja,

Advocates.

CORAM:

HON'BLE MR. JUSTICE MADAN B. LOKUR

HON'BLE DR. JUSTICE S. MURALIDHAR

1. Whether Reporters of local papers may be allowed

to see the judgment? Yes

2. To be referred to the Reporter or not? Yes

3. Whether the judgment should be reported in Digest? Yes

JUDGMENT

Dr. S.Muralidhar, J.

1. These are 12 references relating to various assessment years raising similar questions. Since the parties

are agreed that the lead matter is IT Ref. No. 75 of 1986 and that a decision in that reference would

govern the rest of the references, we propose to deal with IT Ref. No. 75 of 1986 in detail.

2. Relevant for the asst. yr. 1979-80, the following question of law has been referred to us by the

Income-tax Appellate Tribunal, Bench A, New Delhi (‘Tribunal’) under s. 256(1) of the IT Act, 1961

(Act) :

"Whether, on the facts and in the circumstances of the case, the Tribunal is correct in law in holding

that the assessee was entitled to investment allowance under s. 32A of the IT Act ?"

3. The assessee, who started a business in the name and style of M/s Complete Dewatering Systems

w.e.f. 1st July, 1977, claimed that he is engaged in two distinct activities, for each of which he claimed

investment allowance under s. 32A of the Act. The first activity was the running of an industrial

undertaking engaged in the business of construction. The assessee claimed to have participated in the

business of construction by dewatering the land i.e. pumping out water from the ground water table so

that the work of excavation of the land thereunder could take place in completely dry conditions.

According to the assessee dewatering is integral to the construction activity and for this purpose he

used his own equipments on the site. The second activity was the manufacture of the dewatering

equipment itself. The assessee claimed that he purchased different component parts and assembled

them at the site on which the dewatering was to take place. Unless so assembled the dewatering

equipment could not be used.

4. During the previous year relevant to the assessment year in question, the assessee secured a works

contract from the Engineering Construction Corporation Limited (‘ECCL’) for carrying out dewatering at one of its construction sites. The ECCL was awarded a contract by the Government of Tamil Nadu

through the Tamil Nadu Electricity Board for construction of a thermal power plant at Tuticorin. In

turn the ECCL subcontracted the incidental works of which the work of dewatering was awarded to the

assessee. The contract envisaged the assessee having to take to the site in question his own plant and

machinery and also engage his own labour.

5. According to s. 32A of the Act, investment allowance is admissible in respect of plant and

machinery owned by the assessee and installed after 31st March, 1976 in an industrial undertaking for

the purposes of the business of construction, manufacture, production of any article or thing not being

an article or thing specified in the list in the XI Schedule to the Act. For the assessment year in

question, the assessee claimed a total investment allowance of Rs. 2,67,750.32, which was worked out

in the following manner. For the manufacturing activity, the assessee prepared a separate

manufacturing-cum-trading account. In this he showed that although he did not sell any completed

dewatering equipment during the year, he used materials worth Rs. 16,394. On this he claimed investment allowance at the rate of 25 per cent which worked out to Rs. 4,098.59. As regards the

dewatering equipment used for the purposes of the works contract at Tuticorin, the assessee debited the

entire cost of Rs. 10,54,606.94 under a separate head ‘Dewatering equipment’. The investment

allowance claimed at the rate of 25 per cent on this worked out to Rs. 2,63,651.73.

6. The Assessing Officer (‘AO’) disallowed the claim of investment allowance on both activities.

According to the AO assembling of the components and parts at the site of construction did not have

the attribute of manufacture of dewatering equipment. Further, the AO held that the assessee did not

run an industrial undertaking in which he had installed plant and machinery for the purposes of

construction of an article or thing.

7. In the appeal filed by the assessee, the Commissioner of Income-tax (Appeals) [‘CIT(A)’] held that

as regards the activity of manufacture of dewatering equipment, the assessee had indeed assembled accessories worth Rs. 16,394 and was therefore entitled to investment allowance on such sum at the

rate of 25 per cent. However, as regards the second activity, the CIT(A) held that although dewatering

may be one of the integrated activities of construction, such activity in itself did not result "into any

end product of any article or thing, nor such activity by itself would constitute a business of

construction." Thus, while allowing the claim of investment allowance to the extent of Rs. 4,098 on the

machinery used in the manufacture of dewatering equipment, the CIT(A) negatived the larger claim of

investment allowance on the dewatering equipment of a value of Rs. 10.54 lakhs used in the

construction by ECCL of the plant at Tuticorin.

8. The further appeal by the assessee was allowed by the Tribunal by its order dt. 15th Jan., 1985. The

Tribunal examined the entire process undertaken by the assessee to execute the dewatering work, and

concluded that "it is not perhaps possible to say that this is not an industrial undertaking engaged in

business of construction." It then proceeded to hold that "it is not necessary that the business of

construction must be carried on by the assessee himself" and that even if the machinery is hired out to a firm of contractors, the requirements of s. 32A were satisfied. For this proposition the Tribunal relied

on the decision of the Madras Bench of the Tribunal in First Leasing Co. of India Ltd. vs. ITO (1983) 3

ITD 808 (Mad) . It further held that the words "for the purposes of business of construction,

manufacture or production of any article or thing" in s. 32A(2)(b)(iii) of the Act embraced even the

activity undertaken by the assessee which was "participating in the construction work" and that it was

not necessary that the assessee should itself undertake the business of construction. Thereafter, the

Revenue applied to the Tribunal under s. 256(1) of the Act and the question set out in para 1 was

referred for our opinion.

9. Ms. Rashmi Chopra, learned senior standing counsel for the Revenue, clarified at the outset that the

Revenue was not assailing the grant of investment allowance on the machinery of the value of Rs.

16,394 used in the assembling of dewatering equipment. She, however, submits that the assessee’s

claim of investment allowance on the dewatering equipment of the value of Rs. 10.54 lakhs used in the construction work was inadmissible and that the case is entirely covered in favour of the Revenue and

against the assessee by the judgment of the Supreme Court in CIT vs. N.C. Budharaja (1993) 114 CTR

(SC) 420 : (1993) 204 ITR 412 (SC) . According to her the Supreme Court has categorically ruled that

the word "construction" used in s. 32A did not comprehend the construction of a dam, a bridge, a canal

or a road but it had to be read in the context of construction, production or manufacture of an "article"

or "thing." Admittedly the assessee here was not involved in the construction of any article or thing.

Where even to a person undertaking the activity of construction no investment allowance would be

admissible, even less would it be admissible to a person, like the assessee, who claims to be

participating in such construction activity. She further points out that the Supreme Court reiterated its

decision in Budharaja (supra) in the subsequent decision in Builders Association of India vs. Union of

India & Ors. (1994) 122 CTR (SC) 543 : (1994) 209 ITR 877 (SC). She accordingly submits that the

Tribunal erred in holding that the assessee was entitled to claim investment allowance on the

dewatering equipment used in the construction work.

10. Appearing for the assessee, Mr. D.N. Sawhney, learned advocate, after taking us through the

exhaustive decision of the Tribunal which is under challenge, made three main submissions. First, he

says that the activity of the assessee is covered by the plain language of s. 32A(2)(b)(iii) which is "for

the purposes" of the business of construction of an article or thing. He lays emphasis on these words

and submits that since the Tribunal has found as a fact that the dewatering activity is integral to the

activity of construction of the article or thing, and that the assessee has participated in such activity, the

claim for investment allowance is admissible. Second, he submits that the decision in Budharaja

(supra) does not dilute his claim because his claim is also based on the activity of construction of an

"article" or "thing." He explains that by this he means that the water which is extracted in the process

of dewatering is the "article" or "thing" contemplated by s. 32A. Thirdly, Mr. Sawhney submits that in

any event after the decision of the Supreme Court in CIT vs. Shaan Finance (P) Ltd. (1998) 146 CTR

(SC) 110 : (1998) 231 ITR 308 (SC) , it is settled that the claim of investment allowance will not be

denied to an owner of a plant or machinery, even though it may not be used in the assessee's own

business, as long as it is used in the business of manufacture or production of an article or thing by someone else. He accordingly submits that the Tribunal was justified in allowing the assessee's claim

on the basis of the decision of the Madras Bench of the Tribunal in First Leasing Co. of India Ltd.

(supra) which has been affirmed by the High Court and by the Supreme Court in Shaan Finance.

11. Before dealing with the first submission on behalf of the Revenue based on the decision in

Budharaja (supra), it is necessary to examine s. 32A and in particular sub-s. (2)(b)(iii) thereof under

which the assessee bases his claim for investment allowance. Sec. 32A reads as under :

"32A. Investment allowance— (1) In respect of a ship or an aircraft or machinery or plant specified in

sub-s. (2), which is owned by the assessee and is wholly used for the purposes of the business carried

on by him, there shall, in accordance with and subject to the provisions of this section, be allowed a

deduction, in respect of the previous year in which the ship or aircraft was acquired or the machinery or

plant was installed or, if the ship, aircraft, machinery or plant is first put to use in the immediately

succeeding previous year, then, in respect of that previous year, of a sum by way of investment allowance equal to twenty-five per cent of the actual cost of the ship, aircraft, machinery or plant to the

assessee :

Provided ....

Provided further ....

Explanation : ....

(2) The ship or aircraft or machinery or plant referred to in sub-s. (1) shall be the following, namely :

(a) a new ship or new aircraft acquired after the 31st day of March, 1976, by an assessee engaged in the

business of operation of ships or aircraft;

(b) any new machinery or plant installed after the 31st day of March, 1976,—

(i) for the purposes of business of generation or distribution of electricity or any other form of power;

or

(ii) in a small-scale industrial undertaking for the purposes of business of manufacture or production of

any article or thing; or

(iii) in any other industrial undertaking for the purposes of business of construction, manufacture or

production of any article or thing, not being an article or thing specified in the list in the Eleventh

Schedule :"

12. In order to claim investment allowance at the rate of 25 per cent of the actual cost of the plant or

machinery in terms of s. 32A(2)(b)(iii), the assessee in the instant case was required to demonstrate the

following :

(a) that the assessee owns the machinery or plant in question;

(b) that such plant or machinery is installed after 31st March, 1976 in an industrial undertaking other

than a small-scale industrial undertaking covered by s. 32A(2)(b)(ii);

(c) that such plant or machinery is installed for "the purposes of business of construction, manufacture

or production of any article or thing"; and

(d) that such plant and machinery is wholly used for the purposes of the business carried on by the

assessee.

13. The assessee succeeded before the CIT(A) and the Tribunal in showing that it owned the machinery

in question, that is the dewatering equipment. The CIT(A) however did not agree that such machinery

had been installed in "an industrial undertaking" or that such machinery had been used in the

production of any article or thing. Therefore, the question of examining whether such use was for the

business of the assessee did not arise as far as the CIT(A) was concerned. The Tribunal however

viewed the assembling of the machinery on the construction site to produce the dewatering equipment

as "an industrial undertaking" of the assessee. Therefore it held that factor (b) above stood satisfied. It

must be remembered that at the time the Tribunal gave its decision the decision in Budharaja (supra) had not been rendered. Therefore, on the basis of the law as explained by the High Court till then, the

Tribunal focussed its attention on the expression "for the purposes of the business of construction." It

found that although it was ECCL which was engaged in the business of construction, the assessee had

nevertheless owned the machinery which had been used for such purpose. Therefore it held that factor

(c) was also satisfied. As regards factor (d) the Tribunal likened the assessee using its dewatering

equipment at the construction site of the ECCL to the transaction of lease or hire. Basing its opinion on

the decision of the Madras Bench of the Tribunal in First Leasing Co. of India Ltd. (supra) it held that

the equipment had been used "wholly" for such business of the assessee.

14. Till the decision in Budharaja (supra) it was thought, even by the Government of India, that the

benefit of investment allowance under s. 32A was available to the "business of construction". In other

words, if the plant and machinery was used in construction of buildings, roads, bridges and so on, a

construction company which was awarded such works and also was the owner of such plant and machinery would be allowed to claim investment allowance. However, Budharaja changed all that.

This decision by a two Judge Bench of the Supreme Court gave an entirely different meaning to the

words "the purposes of business of construction, manufacture or production of any article or thing"

used in s. 32A(2)(b)(iii). The Court was not prepared to read the words "business of construction"

separately but only conjoint with "manufacture or production of any article or thing." In other words,

one had to read it as "construction of an article or thing" where the focus was on the end product,

namely the article or thing; and the word "construction" merely referred to the process of bringing

about such article or thing. Consequently, the "business" activity contemplated was the bringing about

the article or thing and the words "construction", "manufacture" or "production" only referred to the

choice of processes for bringing about the end product of "any article or thing". The words "for the

purposes of" therefore referred to the business just described.

15. It will be noticed that Budharaja (supra) is a fairly lengthy decision involving different types of

cases, which the Court divided into groups. The second group of cases pertained to s. 32A and the discussion on this aspect begins at ITR p. 429 where the Supreme Court refers to the decision of the

Karnataka High Court in Shankar Construction Co. vs. CIT (1991) 94 CTR (Kar) 155 : (1991) 189 ITR

463 (Kar) . The Supreme Court examined the legislative history of the provision and concluded (ITR,

p. 434) that s. 32A(2)(b)(iii) "does not comprehend within its ambit construction of a dam, a bridge, a

building, a road, a canal or other similar constructions." On this interpretation, in effect, those in the

"business of construction" would be ineligible to claim the benefit of investment allowance.

16. In Builders Association of India vs. Union of India & Ors. (supra), a valiant attempt was made by

the construction industry to persuade the Supreme Court to reconsider its view. Mr. N.A. Palkhivala,

senior advocate, attempted to convince the Supreme Court, albeit unsuccessfully, that the word

"construction" denoted the "business of construction" and ought not to be read with "article or thing".

He pointed out that the opinion of the Union Law Ministry, as conveyed in Parliament, and a circular

issued by the CBDT was that the construction industry would be able to avail of the benefit of investment allowance under s. 32A and that an earlier decision of the Supreme Court in CIT vs.

Bhageeratha Engineering Ltd. (1993) 199 ITR 12 (SC) had taken a view contrary to what was held in

Budharaja .

17. However, the Supreme Court declined to reconsider the view expressed by it in Budharaja (supra).

It held in Builders Association of India (supra) that (ITR, p. 885) :

"We are not persuaded to take a different view than the one taken in the said decision. We are of the

considered view that the word ‘construction’ occurring in the said sub-clause cannot be dissociated

from the following words ‘manufacture or production of any article or thing not being an article or

thing specified in the list in the Eleventh Schedule’. The context and the structure of the sub-clause

does not permit such dissociation of the word ‘construction’ from the following words. If that were the

intention of the Parliament, it would have employed appropriate words to dissociate the word

‘construction’ from the following words. There are none. The absence of any such words clearly and

conclusively militates against the contention of Shri Palkhivala. As explained in the said judgment, the word ‘construction’ was retained in the new sub-cl. (iii) because the ships continue to be within the

purview of present sub-cl. (iii) as they were within the purview of former sub-cl. (ii). It is not necessary

to repeat the reasoning in Budharaja & Co.’s case over again."

Further, it held that the opinions expressed by the Law Ministry or the CBDT did not bind the Supreme

Court. It distinguished the decision in Bhageeratha Engg. Ltd. (supra) on the ground that the Revenue

there did not challenge the finding that the assessee had used the machinery in the business of

construction. Further, Bhageeratha Engg. dealt with a set of facts which did not involve the

interpretation of the words "construction, manufacture or production of any article or thing." No other

decision of a Larger Bench of the Supreme Court taking a view contrary to Budharaja (supra) has been

brought to our notice. It continues to be the binding decision on the point.

18. In our considered view, the learned counsel for the Revenue is right in her submission that

Budharaja (supra) covers the case on hand in favour of the Revenue and against the assessee. On the facts pleaded by the assessee throughout, namely that it either engaged in construction activity itself or

participated in such activity undertaken by the ECCL, the inescapable conclusion, on an application of

the dictum in Budharaja (supra), is that the assessee is disentitled to claim investment allowance on the

dewatering equipment used in the construction by ECCL of the thermal power plant at Tuticorin.

19. The second submission of Mr. Sawhney that the "thing" or "article" which is produced or

"constructed" is the water that is extracted by the use of the dewatering equipment has only to be stated

to be rejected. The assessee admittedly uses the equipment on land (or earth) that is not dewatered and

the use of the equipment is expected to render such land dewatered. Land, an immovable property,

cannot as explained in Budharaja (supra) fall within the ambit of "thing" or "article" as they are used in

s. 32A(2)(b)(iii). For the same reason we do not find the decision in CIT vs. Sesa Goa Ltd. (2004) 192

CTR (SC) 577 : (2004) 271 ITR 331 (SC) to be of relevance since in that case what was extracted after

use of the machinery on land was iron ore, which is certainly a "thing."

20. The decision in Shaan Finance (supra) turned on a different set of facts. The main distinguishing

feature is that, as the question framed for consideration there indicates, there was no dispute that the

machinery was used by companies "engaged in the manufacture of an article or thing". Not one of them

was a construction company, and if any of them was, the earlier decision in Budharaja (supra) would

have negated their claim. Secondly, the companies claiming investment allowance were leasing

companies and for the purposes of sub-s. (1) of s. 32A the equipment was "wholly" used for such

business of leasing. The assessee's case here was not that he was giving the equipment on lease or hire

to ECCL. The Tribunal appears to have travelled beyond the pleaded facts in coming to such a

conclusion. In any event, it was never the assessee's case that ECCL was producing any "article or

thing". On the facts pleaded ECCL was constructing a thermal power plant. Clearly, on these facts,

Budharaja (supra) would knock out any claim of investment allowance. The third submission of the

learned counsel for the assessee does not merit acceptance.

21. We accordingly hold that, the assessee is not entitled to claim investment allowance on the

dewatering equipment of the value of Rs. 10.54 lakhs used in the construction work undertaken by

ECCL. The question of law is answered in the negative, that is in favour of the Revenue and against the

assessee.

22. The reference is disposed of accordingly. Separate consequential orders are passed accordingly in

each of the connected reference petitions.