The Commissioner Of Income Tax(Cntl), ... vs M/S Hero Cycles Pvt. Ltd. Ludhiana on 28 August, 1997

Equivalent citations: AIR 1998 SUPREME COURT 1555, 1997 (8) SCC 502, 1998 AIR SCW 906, 1998 TAX. L. R. 283, (1997) 6 SCALE 59, (1997) 94 TAXMAN 271, 1998 (1) UPTC 272, 1998 KERLJ(TAX) 1, (1997) 7 JT 726 (SC), 1998 UPTC 1 272, (1997) 228 ITR 463, (1997) 8 SUPREME 150, (1997) 141 TAXATION 366, (1997) 142 CURTAXREP 122

Bench: Suhas C. Sen, S. Saghir Ahmad

PETITIONER:
THE COMMISSIONER OF INCOME TAX(CNTL), LUDHIANA

Vs.

RESPONDENT:
M/S HERO CYCLES PVT. LTD. LUDHIANA

DATE OF JUDGMENT: 28/08/1997

BENCH:
SUHAS C. SEN, S. SAGHIR AHMAD

ACT:

HEADNOTE:

JUDGMENT:

Present:

Hon'ble Mr. Justice Suhas C. Sen Hon'ble Mr. Justice S. Saghir Ahmad] T.L.V. Iyer, Sr. Adv., Ms. Renu George, S. Rajappa, C. Radha Krishna, Ms. Janaki Ramachandran. Ms. Meenakshi Arora, A.T.M. Sampat Adcs. with him for the appellant in C.A.No. 4671/88, 4043/84,5775/95, 5620-21/95 and 2230-31/95. Uma Datta and B. Kanta Rao, Advs. for the Respondents.

O R D E R The following Order of the Court was delivered:

With C.A.Nos.7666, 7667, 7965/96, 1494-96/88, 556/90, 5755/95. 4043/84, 7763/95, 7045/95, 12419/96, 5620-21/95, 6942/95, 387/85, 786-88, 7847, 2230-31, 3120/95. 6085/97, 6087-6033/97, 606/97, 6089-91/97, 6-92/97, 6093/97, 6095/97, 6094/97 Civil Appeals Nos. 6085/97, 6087-6083/97, 6086/97, 6089- 91/97, 6092/97, 6093/97, 6095, 6094/97 of 1997 (Arising out of SLP (C) Nos. 7485/86, 4588-89/89. 9027, 10982/87, 4663-65/89, 8620, 10949/95, 4671/88 and 9065/94) O R D E R The following question of law was referred by the Tribunal to the High Court:

"Whether on the facts and in the circumstances of the case on a proper interpretation of Section 35-B of the income Tax Act, 1961, the Appellate Tribunal was right in law in allowing assessee's claim for weighted deduction in respect of "Export Sales Commission"

"E.C.G.C. Charges" and "Foreign Dealers Visiting Expenses"?

The High Court declined to call for a reference under Section 256(2) of the Income Tax Act, 1961. It appears that the claim for deduction under Section 358 was not originally allowed at all. Thereafter, on an assesee's application an order was passed by the Commissioner of Income Tax (Appeals) Jalandhar, in which he directed certain allowances to be given on proportionate basis after verification of the assessee's claim under Section 358.

The Income Tax Officer thereafter entertained assessee's prayer for rectification of the order and allowed the assessee's claim in respect of matters like Coloured Albums, Export staff travelling expenses, Export sales commission, E.c.G.C., foreign dealers visiting expenses. Rectification under Section 154 can only be made when glaring mistake of fact or law has been committed by the officer passing the order becomes apparent from the record. Rectification is not possible if the question is debatable. Moreover, the point which was not examined on fact or in law cannot be dealt as mistake apparent on the record. The dispute raised a mixed question of fact and law.

The Tribunal was in error in upholding the assessee's claim for weighted deductions.

There is no point in sending the matter to the High Court to deal with the question raised at this stage. We treat the question raised at this stage. We treat the question as referred to this Court and answer the question in the negative and in favour of The Revenue. There will be no order as to costs. The appeal is allowed. C.A. Nos. 7666/7667/96, SPL(C) Nos.7485/86, 4588-89/89 Leave granted in Special Leave Petitions. The following questions of law was sought to be raised by the Revenue from the order of the Tribunal for reference to the High Court:

"(i) Whether on a proper interpretation of the agreements between the S.T.C. and its subsidiary HHEC, the Appellate Tribunal is right in law in holding that one per cent margin money earned by the HHEC under its agreement of Export Business Association with the assessee is in the nature of expenditure as contemplated by Section 35B and not the income of the HHEC on its own entitlement on the aforesaid agreements as held by the I.T.O?

(ii) Whether on the facts and in the circumstances of the case, the Appellate Tribunal is right in allowing weighted deduction under Section 35B of the Act to the total payment of Rs. 1,87,476/- to the HHEC without any bifurcation?

(iii) Whether on a true interpretation on Section 35B of the Act, the services rendered by the HHEC were to be related itemwise to the various sub-clauses of Clause (b) of sub-section (1) so as to entitle the assessee to weighted deduction in respect of them?

The Commissioner of Income Tax (Appeals) as well as the Tribunal allowed this claim of the assessee without examining the facts of this case. The deduction is permissible if the expenditure is laid out wholly and exclusively for the purpose mentioned in sub-clause (b) of Section 35B. It is for the assessee to prove that the entire expenditure involved was exclusively for the purposes mentioned in sub-clause (b) of Section 35B. The Tribunal has also to give a finding as to the entitlement of the assessee with reference to the particular of sub-clause (b) of Section 35B. The facts have to be found out and the law has to be applied to those facts. It appears that generally a certain percentage of the claim has been allowed under Section 35B without adverting to any of the sub-clauses of

(b) of Section 35B. Under those circumstances, we think it fit to set aside the order of the Tribunal and send the matter back to the Tribunal to dispose it of after examining the facts afresh. The appeals are allowed. The order of the High Court as well as the appellate order of the Tribunal is set aside. There will be no order as to costs.

The amount involved is Rs. 10,000/-only and the case being 23 year old we do not feel inclined to go into the question raised. However, we make it clear that we are not expressing any opinion on the correctness of the decision referred by the Tribunal. The appeal is dismissed. There will be no order as to costs.

The Special Leave Petition is dismissed.

Leave granted In this case large number of questions were sought to be raised. We shall deal with only the question relating to Section 35B. It appears that the Tribunal was totally unmindful of the various sub-clauses of Section 35B(b). Expenses can only be allowed if they are wholly and exclusively incurred for any of the purposes mentioned in these sub-clauses. The section is quite clear and categorical. There is no way that any other Section 35B. It is the assessee's duly to prove acts which will bring the case within any of these sb-clauses. Unless that is done the assessee will not

be entitled to get this deduction. The Tribunal has allowed the deduction without verifying or examining the sub-clauses under which this could be allowed.

We have passed similar orders in a large number of cases but in this case on behalf of the assessee it has been contended that there is a circular issued by Central Board of Direct Taxes, New Delhi which should conclude the matter. A copy of the so-called circular dated 9th April, 1981/13th April, 1981 has been handed over in Court. It does not appear that the document handed over in Court is a copy of Circular at all. It is a letter written to one Shri D'Souza with reference to a letter written by his predecessor. Moreover, it is well-settled that circulars can bind the Income Tax Officer but will not bind the appellate authority or the Tribunal or the Court or even the assessee. There is nothing in the alleged circular which supports the contention of the assessee. It merely says that each case has to be examined and the issue would be basically a find of fact. The assessee had not made his claim before the Income Tax Officer by relying on this Circular.

We set aside the order of the High Court. We also set aside the appellate order of the Tribunal. The Tribunal must examine the question of Section 35B with reference to the various sub-sections of clause (b) of that section. The Tribunal will examine the facts of each claim made by the assessee and find out whether the claim can be allowed having regard to the facts and also the sub-sections of Section 35B(b). The case is sent back to the Tribunal for fresh disposal in the light of the above direction. The assessee must pay cost of this appeal assessed at Rs. 5,000/-

SLP (C) Nos. 4663-645/89 Leave granted.

The claim of the assessee is in respect of relief under Section 35B in respect of certain expenditures incurred by the assessee. The order under challenge passed by the High Court is set aside. The appellate order of the Tribunal is also set aside. The matter should go back to the Tribunal. The Tribunal will examine the case. The assessee must prove before the Tribunal the facts in respect of his claim. The Tribunal will examine the facts and consider the various sub-clauses, sub-sections (b) of section 35B and will decide whether the assessee is entitled to exemption in any of these sub-clauses in respect of expenses incurred. The appeals are disposed of. There will be no order as to costs.

Leave granted.

In this case two questions are involved. So far as Section 40C is concerned, the appeal will have to be dismissed. So far as Section 35B is concerned, the weighted deduction must be examined by the Tribunal on the basis of the facts proved by the assessee and having reference to the various sub-clauses of clause (b) of Section 35B. If the assessee's case comes specifically within any of these sub- clauses it has to be allowed otherwise not. The order of the High Court is wet otherwise not. The order of the High Court is set aside. The case is sent back to the Tribunal for re-examination of the case in the light of the above direction. No order as to costs.

Leave granted.

This case is only concerned with Section 35B. The weighted deduction must be examined by the Tribunal on the basis of the facts proved by the assessee and having reference to the various sub-clauses of clause (b) of Section 35B. If the assessee's case comes specifically within any of these sub-clauses it has to be allowed otherwise not. The order of the High Court is set aside. The appellate order of the Tribunal is also set aside. The case sent back to the Tribunal for re-examination of the case in the light of the above direction. No order as to costs.

SLP (C) No.9065/94 & C.A.Nos. 1494-96/88 and 5567/90 Leave granted in Special Leave Petition. The question in this case relates to scope o Section 44 of the Income Tax Act, 1961. The Section states:

> "Sec. 44. Notwithstanding anything to the contrary contained in the provisions of this Act relating to the computation of income chargeable under the head "Interest on securities", "income from house property", "Capital gains" or "Income from other sources", or in Section 199 or in Sections 28 to 43B, the profits and gains of any business of insurance, including any such business carried on by a mutual insurance company or by a co-operative society, shall be computed in accordance with the rules contained in the First Schedule."

The plain reading of the section will go to show that notwithstanding the other provisions of the Income Tax Act, in particular provisions of Sections 28 to 43B, the profits and gains of any business of insurance shall be computed in accordance with the rules contained in the First Schedule. This is a non-obstante clause and rules have been specially made for computation of profits and gains of insurance business. The rules are contained in the First Schedule of the Act. There is a rule for computation of profits of Life Insurance Business (Rule 2). Another rule has been framed (Rule 5) for computation of profits and gains of other insurance business. This means that profits and gains of other insurance business. This means that profits and gains of insurance business (whether the Life Insurance or General insurance) can only be assessed in the manner laid down in the rules contained in the First Schedule and not in any other manner.

Ms. Ramachandran, learned counsel appearing for the assessee, has contended that Section 44 speaks of "Section 28 to Section 43B". It does not specifically mention Section 35B. Therefore, the assessee was entitled to the benefit of Section 35B. Section 35B was inserted in the Act by way of amendment. When the original Act was passed Section 35B was not in the Statute Book. The contention of Ms. Ramachandran is that when Section 35B was inserted, it was not specifically mentioned that Section 35B will not apply to Insurance Company. Therefore, the benefit of section 35B will have to be given to the Insurance Company.

We are unable to accept this contention for two reasons. First, when the Act speaks of Section 28 to Section 43B then each one of the sections from Section 28 to Section 43B will be included. The newly inserted Section 35B was not specifically mentioned because it was not necessary to do so just as it was not necessary to specifically mention Section 35B in Section 29 which lays down that computation of profits and gains of business or profession shall be computed in accordance with the provisions contained in Section 30 to 43C.

Moreover, when the Act specifically says that profits and gains of insurance business shall be computed in accordance with the rules contained in the First Schedule then such computation has to be made according to the rule and not any other rule. We are unable to accept the contention of Ms. Ramachandran that the benefit of Section 35B should also be given to any insurance Company.

There are certain other questions, apart from Section 35B, involved in this case arising out of the decision of the High Court. Those points are not before us. We do not express any opinion on them. The argument was confined only to Section 35B.

In that view of the matter, we uphold the order of the High Court and dismiss these appeals. There will be no order as to costs.

S.L.P. No. 4671/88 & C.A.Nos. 5755/95 and 4043/84 Leave granted in S.L.P. In view of the decision of this Court in Commissioner of Income Tax, Tamil Nadu vs. M/s National Palayacot Company, Kurinjipadi - [Civil Appeal Nos. 16-17 of 1985], these appeals are dismissed. There will be no order as to costs.

The following two questions of law have been sought to be raised in this Court:

> 1. "Whether on the facts and in the circumstances of the case, the ITAT is right in law in allowing weighted deduction under section 35B of the I.T. Act on car maintenance at Rs. 49,939/-, Motor Cycle at Rs. 3697/- and Generator Expenses at Rs. 4639/- without linking the expenditure to one or more the activities referred to in various sub-clauses of 35B(1)(b) and also ignoring the prohibition contained in sub-clause (iii) ibid regarding expenditure on distribution, supply or provision outside India of Goods etc. Incurred after 31.3.1978?
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> 2. Whether on the facts and in the circumstances of the case, the ITAT is right in law in holding that the assessee was entitled to weighted deduction under section 35B on entire expenditure of Rs.4,24,773/-

and 50% of the expenditure on various items, aggregating to Rs.4,24.773/- and 50% of the expenditure on various items, aggregating to Rs.9,89,9509/-

without linking the expenditure to one or more of the activities referred to in various sub-clauses of Section 35-B (1)(b) and also ignoring the prohibition contained on sub-clause (iii) ibid regarding expenditure on distribution, supply or provision outside India of goods etc. incurred after 31.3.1978?" The High Court dismissed the reference application under Section 256 (2).

We are of the opinion that the Tribunal cannot allow any weighted deduction without linking the expenditure to one or more of the activities referred to in various sub- clauses of Section 35(1)(b). Therefore, in our opinion, the question must be answered in the negative and in favour of the Revenue. The Tribunal will now decide the case afresh after examining the nature of the expenditure and the purposes for which it was spent having regard to the various sub-clauses of Section 35B

(1)(b). The order of the High Court is set aside. The appellate order of the Tribunal is also set aside. The appeal is allowed. There will be no order as to costs.

The dispute in this case relates to an amount of Rs.1,52,694/- (Spindle Fee) paid to the Indian Cotton Mills Federation for Export Promotion Funds. The contribution to the Indian Cotton Mills Federation does not fall within any of the sub-clauses of Section 35B(b). The contribution may be for the promotion of export generally but this sort of contribution to a general body or Chamber of Commerce cannot qualify for weighted deduction. The appeal is allowed. The order of the High Courts well as the appellate order of the Tribunal are set aside. There will be no order as to costs.

In view of the observations made in SLP No.10982/87, the appeal is allowed. There will be no order as to costs. C.A. Nos. 5620-21/95 In view of the observations made earlier these cases are remanded back to the Tribunal. The Tribunal will examine the cases in the light of the various sub-clauses of Section 35B and will also examine the facts to find out whether the expenditures come within any of the categories mentioned in sub-clause (b) of Section 35B. The order of the High Court is set aside. The appellate order of the Tribunal is also set aside. The Tribunal will decide the cases in view of the directions given hereinabove. There will be no order as to costs.

The dispute in this case is about the allowances under Section 35B. The allowances in this case relate to (a) payment to Hosiery Exporters Association, (b) Payment to HHEC, (c) Contribution to Hosiery Exporters Association, and

(d) Charges paid to ECGC: are also expenditure on (e) Establishment, (f) Bonus (g) leave with wages, (h) Salary to Directors, (i) Postage telephone and telegram, and (j) printing and stationary.

The only question in whether payment of HHEC and ECGC qualify for special allowance under Section 35B. The other expenditures are not allowable. The order of the High Court is set aside. The appellate order of the Tribunal is also set aside. The matter is remanded back to the Tribunal only to consider whether the payment of HHEC will qualify for the special exemption given under Section 35B. The Tribunal will examine the facts and find out whether the payment was for any of the activities mentioned in sub-clause (b) of Section 35B. If the expenditure was wholly and exclusively incurred for any of these purposes, the expenditure will qualify for deduction under Section 35B. The Tribunal will examine the case afresh with regard to payments to HHEC and also to ECGC. The other items mentioned in the appellate order of the Tribunal will stand disallowed. The case is remanded back to the Tribunal for fresh disposal. The appeal is allowed. There will be no order as to costs.

The appeal is dismissed. There will be no order as to costs.

C.A. Nos.786-88 of 1995 The appeals are dismissed.

The following question of law was referred to the High Court:

"Whether on the facts and in the circumstances of the case, on a proper interpretation of Section 35B, the Appellate Tribunal was right in law in allowing in respect of foreign claim for weighted deduction in respect of region sales commission, E.C.G.C. charges and expenditure on articles of presentation?"

The question relates to expenditure for which relief was claimed under Section 35B. The Tribunal allowed the expenditure without specifically deciding under which sub- clause (b) of Section 35B the expenditure falls. The case is remanded back to the Tribunal, The Tribunal will re- examine the case having regard to the nature of the expenditure and will try to find out whether such an expenditure qualifies for weighted deduction under Section 35B. The order of the High Court is set aside. The appellate order of the Tribunal is also set aside. The Tribunal will now examine the facts of the case and find out whether the expenditures are allowable under any of the sub- clauses of Section 35B(b). The appeal is allowed. No order as to costs.

C.A.Nos. 2230-31 of 1995 The appeals are dismissed. There will be no order as to costs.

The dispute in this case is about the allowability of weighted deduction under Section 35B of the Income Tax Act. The dispute relates to various expenditures including commissions paid to STC, HHEC and ECGC. There are other expenditures in regard to salary, Director's remuneration, rent, printing and stationery, postage and telegrams etc. Which have not been proved to be wholly or exclusively incurred for the purposes of any of the sub-clauses mentioned in sub-clause (b) of Section 35B. These will have to be disallowed. The order of the Tribunal to this extent is erroneous. so far as commission payable to STC, HHEC and ECGC is concerned, this will have to be examined by the Tribunal afresh. The onus is on the assesee to prove the facts which will enable him to claim weighted deduction. The Tribunal will examine the claim of the assessee and will find out whether the claim is allowable having regard to any of the sub-clauses of Section 35B(b). The judgment of the High Court under appeal is set aside. The appellate order of the Tribunal is also set aside. The Tribunal will now re-hear the case on the points relating to commission paid to STC, HHEC, ECGC only. The appeal is allowed. There will be no order as to costs.