IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX REFERENCE NO.76 OF 1998

Bombay Suburban Electric Supply Ltd. ... Applicant
Versus
Commissioner of Income Tax
Bombay City VI. … Respondent

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Mr. Murlidhar a/w Mr. Rajesh Poojari i/b Mulla & Mulla & Craigie Blunt & Caroe, for the Applicant.
Mr. A.R. Malhotra a/w N.A. Kazi for the Respondent.

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CORAM : M.S. SANKLECHA &
S.C.GUPTE, JJ

DATE : 13 OCTOBER 2016

JUDGEMENT : (Per S.C. Gupte, J.)

. In this reference under Section 256(1) of the Income Tax Act, 1961 ("Act"), the Income Tax Appellate Tribunal ("Tribunal") has referred the following question of law for our consideration :-

> "Whether on the facts and in the circumstances of the case in law, the Tribunal was justified in holding that the assessee was not entitled to claim weighted deduction under Section 35B of the Act ?"

2 The Assessment Year is 1979-80.

3 For the subject assessment year, the assessee claimed weighted

deduction on expenditure amounting to Rs.5,36,77,345/- incurred by it on items enumerated in Section 35B of the Act. Section 35B provides for export markets development allowance, allowing weighted deduction in a sum equal to one and one-third times the amount of expenditure incurred for various export related activities enumerated in clause (1)(a) of Section 35B during the previous year by a domestic company.

4 The case of the assessee is that by an agreement dated 18 June 1977, entered into between Electricity Corporation of Saudi Arabia ("ECSA") and Bharat Heavy Electricals Ltd. ("BHEL"), the latter agreed to provide, deliver at site, erect, set up, work, test, hand over and maintain a turn key project for an electrification scheme known as Wadi Jizan Electrification Scheme ("Main agreement"). BHEL, in turn, entered into agreement dated 24 August 1977 with the assessee, sub-contracting a portion of the work to the latter ("sub-contract"). The sub-contract related to laying out of transmission lines, overhead lines and distribution lines. Under this agreement, the assessee agreed to discharge and fulfill all the duties, obligations and covenants of BHEL under the main agreement entered into between BHEL and ECSA insofar as it related to the work under the sub-contract. The assessee claimed to have incurred expenditure, whilst executing this sub-contract, in respect of its business of provision of technical know-how or rendering services in connection with provision of technical know-how to a person outside India and accordingly become eligible for weighted deduction under Section 35B(1)(a) of the Act.

5 The Assessing Officer rejected the assessee's claim mainly on the ground that the assesee acted only as a sub-contractor of BHEL and thus

was not entitled to any deduction under Section 35B(1)(a). This order was confirmed in appeal by the Commissioner of Income Tax (Appeals) and also by the Tribunal in further appeal.

6 At the outset, Mr. Malhotra, learned Counsel appearing for the Revenue sought to contend that the work executed by the assessee does not amount to provision of technical know-how within the meaning of sub-section (2) of Section 80MM of the Act. It is true, the question of law framed by the Tribunal for our opinion appears on the face of it to be quite open ended. It requires us to consider whether or not, on the facts and in the circumstances, the assessee is entitled in law to the deduction, provided in Section 35B. We are, however, of the view that the question, namely, whether or not the nature of services rendered by the assessee amounts to provision of technical know-how so as to claim the deduction, is not open for us to determine under the statement of case framed by the Tribunal. As held by the Supreme Court in case of **Commissioner of Income Tax Vs. Calcutta Agency Ltd**.[1] , the jurisdiction of the High Court in the matter of income tax references is an advisory jurisdiction. Under the Act, the decision of the Tribunal on facts is final, unless it can be successfully assailed on the ground that there was no evidence for the conclusion on facts recorded by the Tribunal. It is the duty of the High Court to start by looking at the facts found by the Tribunal and answer the questions of law on that footing. In the present case, the Tribunal in its order has not disputed the nature of services rendered by the assessee as provision of technical know-how under sub-section (2) of Section 80MM of the Act. Infact both the assessee and revenue appear to have proceeded on the

1 (1950) 18 CCH 0116 ISCC

footing that the nature of services rendered by the assessee amounts to provision of technical know-how. The only question, which forms part of the statement of case framed by the Tribunal, is whether or not these services are rendered to a person outside India by the assessee within a meaning of sub-section (1A) of Section 35B. We will accordingly restrict our enquiry to the above question.

7 Section 35B of the Act, as it existed at the relevant time (i.e. Assessment Year-1979-80), is in the following terms.

> **35B.** (1)(a) Where an assessee, being a domestic company or a person (other than a company) who is resident in India, has incurred after the 29th day of February, 1968, whether directly or in association with any other person, any expenditure (not being in the nature of capital expenditure or personal expenses of the assessee) referred to in clause (b), he shall, subject to the provisions of this section, be allowed a deduction of a sum equal to one and one-third times the amount of such expenditure incurred during the previous year :
>
> Provided that in respect of the expenditure incurred after 28th day of February 1973 [but before the 1st day of April, 1978], by a domestic company, being a company in which the public are substantially interested, the provisions of this clause shall have effect as if for the words "one and one-third times", the words "one and one-half times" had been substituted]
>
> (b) The expenditure referred to in clause (a) is that incurred wholly and exclusively on-
>
> (i) advertisement of publicity outside India in respect of the goods, services or facilities which the assessee deals in or provides in the course of his business [*where such expenditure is incurred before the 1st day of April 1978*];
>
> (ii) obtaining information regarding markets outside India for such goods, services or facilities ;
>
> (iii) distribution, supply or provision outside India of such goods,

services or facilities, not being expenditure incurred in India in connection therewith or expenditure (wherever incurred) on the carriage of such goods to their destination outside India or on the insurance of such goods while in transit [where such expenditure is incurred before the 1st day of April, 1978];

(iv) maintenance outside India or a branch, office or agency for the promotion of the sale outside India of such goods, services or facilities;

(v) preparation and submission of tenders for the supply or provision outside India of such goods, services or facilities, and activities incidental thereto;

(vi) furnishing to a person outside India samples or technical information for the promotion of the sale of such goods, services or facilities;

(vii) travelling outside India for the promotion of the sale outside India of such goods, services or facilities, including travelling outward from, and return to, India;

(viii) performance of services outside India in connection with, or incidental to, the execution of any contract for the supply outside India of such goods, services or facilities;

(ix) such other activities for the promotion of the sale outside India of such goods, services or facilities as may be prescribed.

Explanation [1] : In this section, "domestic company" shall have the meaning assigned to it in clause (2) of section 80B.

Explanation 2 : For the purposes of sub-clause (iii) and sub-clause (viii) of clause (b), expenditure incurred by an assessee engaged in the business of-

(i) operation of any ship or other vessel, aircraft or vehicle, or
(ii) carriage of, or making arrangements for carriage of, passengers, live-stock, mail or goods,

on or in relation to such operation or carriage or arrangements for carriage (including in each case expenditure incurred on the provision of any benefit, amenity or facility to the crew, passengers or livestock) shall not be regarded as expenditure incurred by the assessee on the

supply outside India of services or facilities.]

[(1A) Notwithstanding anything contained in sub-section (1), no deduction under this section shall be allowed in relation to any expenditure incurred after 31st day of March, 1978, unless the following conditions are fulfilled, namely :-

(a) the assessee referred to in that sub-section is engaged in-

(i) the business of export of goods and is either a small-scale exporter or a holder of an Export House Certificate; or
(ii) the business of provision of technical know-how, or the rendering of services in connection with the provision of technical know-how, to persons outside India; and

(b) the expenditure referred to in that sub-section is incurred by the assessee wholly and exclusively for the purposes of the business referred to in sub-clause (I) or, as the case may be, sub-clause (ii) of clause (a).

Explanation : For the purpose of this sub-section,-

(a) "small-scale exporter" means a person who exports goods manufactured or produced in any small-scale industrial undertaking or undertakings owned by him :
Provided that such perso does not own any industrial undertaking which is not a small-scale industrial undertaking;
(b) "Export House Certificate" means a valid Export House Certificate issued by the Chief Controller of Imports and Exports, Government of India ;
(c) "provision of technical know-how" has the meaning assigned to it in sub-section (2) of Section 80MM;
(d) "small-scale industrial undertaking" has the meaning assigned to it in sub-section (2) of the Explanation below sub-section (2) of Section 32A.]

(2) Where a deduction under this section is claimed and allowed for any assessment year in respect of any expenditure referred to in sub-section (1), deduction shall not be allowed in respect of such expenditure under any other provision of this Act for the same or any other assessment year.

8 Clause (a) of Sub-section (1) of Section 35B allows the assessee deduction provided therein in respect of expenditure referred to in clause (b) incurred by him, whether directly or in association with any other person. All nine items forming part of clause (b) make it clear that the expenditure referred to therein is for work done or information gathered or goods, services or facilities distributed, supplied, provided, maintained, etc. outside India. There is no reference in clauses (a) or (b) of Sub-section (1) of the assessee himself being engaged in the business of exporter of goods or services or incurring the expenditure in connection with such business. Sub-section (1A), which is introduced by Finance Act, 1978, with effect from 1-4-1978, however, introduces a further condition for claiming deduction under sub-section (1)(a). The condition required to be fulfilled under sub-section (1A) for claiming deduction under clause (a) of Sub-section (1) is that the assessee himself must be engaged in the business of export of goods and is either a small-scale exporter or a holder of an Export House Certificate or in the business of provision of technical know-how or rendering of services in connection therewith to persons outside India. It also requires further that the expenditure referred to in clause (b) of sub-section (1) is incurred by the assessee wholly and exclusively for the purpose of such business of export of goods or technical know-how, as the case may be.

9 A bare reading of the provision makes it clear that whatever may have been the position earlier, for the assessment year 1979-80, i.e. after introduction of sub-section (1A), the assessee for claiming deduction under Section 35B has to be an exporter of goods or technical know-how and the expenditure should have been incurred by him in connection with

that business.

10 If one has regard to the agreement between the assessee and BHEL, which is described as a "back to back agreement", the main contract for supply, delivery and provision to a person outside India, namely, in this case, ECSA, was entered into by BHEL and that it was at the instance of BHEL that the assessee had submitted its offer with regard to the provision of services in terms of the main contract. This was essentially a sub-contract and the assessee was a sub-contractor, who was responsible to, and supplied goods and services to, BHEL, an Indian party. The back to back agreement shows that the assessee was to furnish programme for submission of design calculations, layout drawings and documents forming part of the contract for approval of BHEL, who had the right to modify the same. It was only after the final approval of BHEL that the drawings, documents and calculations were to be submitted at site. The contract price, which was stated to be payable in Saudi Riyals, was to be paid by BHEL to the assessee. The contract also makes it clear that the export incentives in respect of the execution of the contract would belong to BHEL, and, wherever applicable, would be passed on to the assessee by BHEL. On a bare reading of this contract, it clearly appears to be a sub-contract where obligations are owed by the assessee to the main contractor, namely, BHEL. The assessee has no obligations to the person outside in India, namely, in this case, ECSA.

11 In other words, what emerges from the record is that the exporter of know-how in the present case was BHEL, who provided know-how to a person outside India, namely, ECSA. It is BHEL, who, as such exporter,

incurred expenses for the purpose of provision of technical know-how to a person outside India. The assessee as a sub-contractor of BHEL, did not provide any technical know-how to a person outside India and was not entitled to claim any deduction under Section 35B, as it was then applicable. All authorities below, namely, the Assessing Officer, the Commissioner of Income Tax (Appeals) and the Tribunal, came to a concurrent conclusion that the assessee was not an exporter of any goods or know-how and was merely a sub-contractor of BHEL, who provided these services to BHEL and not to the person outside India, namely, ECSA. As held by the Tribunal in its order dated 18 November 1991, the agreement was entered into between BHEL and the foreign party and it was the duty of former to provide whatever services were contracted to the latter. As to how these services were to be provided to the foreign party was in the exclusive domain of BHEL. It alone was responsible to the foreign party for the provision of these services. In the premises, the Tribunal was right in coming to the conclusion that whatever was provided to the foreign party was clearly by BHEL and not the assessee concerned. The Tribunal rightly concluded that what was done by the assessee-company, however technically specialized job it may be, it was done only for BHEL as a sub-contractor and not for a person outside India and that, accordingly, it did not entitle the assessee to any deduction under Section 35B.

12 Mr. Murlidhar, learned Counsel for the Assesee, relied on the case of **Commissioner of Income Tax Vs. Stepwell Industries Ltd**.[2] In that case, the assessee's goods were sold by State Trading Corporation of India to

2 (1997) 228 ITR 171

various parties outside India. The assessee claimed weighted deduction under Section 35B(1)(b)(i) and (iv). The Supreme Court did not allow the claim of the assessee in the facts of the case, on the ground that the assessee had failed to prove that the assessee had incurred any expenditure wholly and exclusively for the purposes set out in Section 35B(1)(b). It did, in the course of its reasoning, however, observe that had the State Trading Corporation incurred expenditure for advertisement or publicity outside India for and on behalf of the assessee and in respect of the goods the assessee deals in or provides in the course of his business, the assessee could have availed of the deduction. Mr. Murlidhar relied on these observations to contend that there is no need for a nexus between the assessee and the foreign party to whom the supply is made. As we have noted above, whatever may have been the position under Section 35B as it existed prior to 1-4-1978, with effect from that day and till sub-section (1A) remained on the statute book, the requirement of law to claim this deduction was that the assessee must be an exporter of goods or provider of technical know-how to a person outside India and the expenditure must be incurred for such export of goods or provision of know-how to a person outside India. The Supreme Court, in case of **Stepwell Industries Ltd** *(supra),* had no occasion to deal with the provisions of Sub-section (1A) introduced in the Act. The judgment in the case of **Stepwell Industries Ltd,** thus, offers no assistance to the assessee in the present case. The assessee's case clearly falls within the Assessment Year 1979-80 and it is covered by the provisions of sub-section (1A).

13 In the premises, there is no infirmity in the orders of the authorities below.

14 The question of law as framed by the Tribunal is, accordingly, answered in the affirmative, that is to say, in favour of the Revenue and against the Assessee. The Reference is disposed of in the above terms.

(S.C. GUPTE, J.) **(M.S. SANKLECHA, J.)**