

A BUILDERS ASSOCIATIONS OF INDIA

v.

UNION OF INDIA AND ORS.

AUGUST 1, 1994

B [B.P. JEEVAN REDDY AND S.C. SEN, JJ.]

Income Tax Act, 1961—Sections 32A(2)(b)(iii) and 32A(2A)—As inserted by Finance (No. 2) Act, 1977.

C *The word "construction" occurring in the sub-clause (iii) of clause (b) of Sub-Section (2) of Section 32A of Income Tax Act. Not to be dissociated from the words "manufacture or production of any article or thing not being an article or thing specified in the list in the Eleventh Schedule"—By the retention of the word "construction" in the new sub-clause (iii), it was intended that the ships shall continue to be within the purview of present sub-clause*
D *(iii) as they were within the purview of erstwhile sub-clause (ii).*

Interpretation of Statutes—Taxing Laws.

Opinion of Law Ministry and reply of Minister of State for Finance in Parliament—Not of much relevance for the purpose of interpreting sub-clause
E *(iii) of clause (b) of Sub-Section (2) of Sec. 32A of the Income tax Act, 1961.*

A writ petition was filed under Art. 32 challenging the correctness of the decision of this Court in Commissioner of Income Tax v. N.C. Budharaja & Co., (204) I.T.R. 412.

F *The challenge was based on the ground that as the following three important circumstances were not brought to the notice of this Court, the decision, in so far as it relates to Section 32A(2)(b)(iii), requires reconsideration by a larger Bench :-*

G *(a) The word "construction" in clause (iii) of clause (b) of Sub-Section (2) of Section 32A should be read independent of and not in association with the words following, viz., "manufacture or production of any article or thing".*

(For this proposition reliance was placed on the opinion of Law
H *Ministry and Reply of Finance Minister in Parliament)*

(b) The circular issued by the Central Board of Direct Taxes in the year 1986 [published in 161 I.T.R. (statutes) 24 to 26] with reference to Section 32-AB which was introduced with effect from April 1, 1987 but which contains identical words negatives the construction put by this Court in *Budharaja's* case.

(c) This court had in *Commissioner of Income Tax v. Bhageeratha Engineering Limited*, (1993) I.T.R. 12, taken a view contrary to the one taken in *Budharaja and Co.* with respect to Section 32A(2)(b)(iii).

Dismissing the writ petition,

HELD : 1.1. Sub-clause (iii) of Clause (b) of Sub-section (2) of Section 32A of the Income tax Act, 1961 continues to apply to ships. 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. As explained in the *Budharaja's* case, the word "construction" was retained in the new sub-clause (iii) because the ships continue to be within the purview of present sub-clause (iii) as they were within the purview of former sub-clause (ii). It is not necessary to repeat the reasoning in *Budharaja & Co.* over again. [379-D; 385-F-G-H; 386-A]

1.2. Sub-section (2A) of Section 32A was inserted by Finance (No. 2) Act, 1977 by way of an amendment; Sub-section makes it clear that if any machinery or plant is used mainly for the purpose of business of construction, manufacture or production of any article or thing which does not fall within the prohibited list in the Eleventh Schedule, it will qualify for prohibited list in the Eleventh Schedule, it will qualify for deduction under Section 32A. The deduction will not be denied only because such machinery or plant is also used for the purpose of business of construction, manufacture or production of any article or thing included in the prohibited list. Sub-section (2A) of Section 32A is clarificatory in nature. It clarifies that machinery or plant mainly used for *inter alia*, construction of articles or things which are not included in the prohibited list, will qualify for

A diduction under Section 32A, notwithstanding the fact that such machinery or plant is also used for construction of articles or things contained in the prohibited list. [386-B, D-E-F]

B 1.3. If the word 'construction' is not to be associated with the phrase 'any article or thing' then it was not necessary to use the phrase 'construction, manufacture or production of any article or thing' in the clarificatory sub-section (2A). It will then have to be held that the word 'construction' in sub-section (2A) is redundant and a mere surplusage. Opinion of the Law Ministry and the reply of the Minister of State for Finance in the Parliament are not of much relevance on the construction of the said sub-clause by this Court. [386-G-H; 387-A]

D 1.4. The opinion of the Law Ministry may be in favour of the assessee or may be against the assessee. Similarly the answer given by the Minister may be in favour of the assessee or against him. They are mere opinions and cannot be treated as binding upon the Courts. [387-A]

E 1.5. The circular of the C.B.D.T. issued in the year 1986 explaining the provisions in Section 32AB does not in any manner help the assessee. The said circular issued with reference to a different provision and explaining a different scheme altogether can have no significant relevance as an instruction or direction under Section 119 vis-a-vis Section 32A. The relevance, if any, is only inferential - and, therefore, remote. It is significant that the said circular also deals with Section 32A but no such statement is contained therein. Even if the said circular had been brought to the notice of this Court, it could not have made any difference. [387-F; 388-E-F]

G 1.6. In *Commissioner of Income Tax v. Bhageerath Engineering Ltd.*, (1993) I.T.R. 12 the interpretation of the words "construction, manufacture or production of any article or thing not being an article or thing specified in the list in the Eleventh Schedule" was not really in issue. It, therefore, cannot be said that this Court has taken a different view on the interpretation of the said words in *Bhageeratha Engineering Ltd.* [382-D; 389-B]

H *Commissioner of Income Tax v. N.C. Budharaja & Co.*, (1993) 204 ITR 412 :1993 Tax LR 1117, followed and *Commissioner of Income Tax v. Bhageeratha Engineering Ltd.*, (1993) 199 ITR 12, distinguished. [329-C]

CIVIL ORIGINAL JURISDICTION : Writ Petition (Civil) No. 430 of 1994. A

(Under Article 32 of the Constitution of India.)

Nani Palkivala, V. Gaurishankar and S. Rajappa for the Petitioner. B

The following Order of the Court was delivered :

Though we are dismissing this writ petition preferred under Article 32 of the Constitution of India at the stage of admission itself, we deem it appropriate to record our reasons therefor in view of the contentions urged by Shri N.A. Palkhivala, learned senior advocate for the petitioner. C

In *Commissioner of Income Tax v. N.C. Budharaja & Co.*, 204 I.T.R. 412, a Bench of this Court comprising one of us (B.P. Jeevan Reddy, J.) and N. Venkatachala, J. held *inter alia* that the words "construction, manufacture or production of any article or thing not being an article or thing specified in the list in the Eleventh Schedule" occurring in sub-clause (iii) of clause (b) of sub-section (2) of Section 32-A of the Income-Tax Act, 1961 do not take in construction of a dam, a building, a bridge, a road and the like. The reason given was that a dam, a building, a bridge or road cannot be brought within the purview of the words "article or thing". After referring to the legislative history of the said clause it was held that the words "any article or thing" refer to only movables and that the use of the word "construction" in the said clause is referable to construction of ships. It was held that the words "construction, manufacture or production of any article or thing" cannot be extended to construction of immovable properties like the construction of a dam, building, bridge, a road and the like. It was observed that doing so would do violence to the plain meaning of the words "article or thing" occurring in the said sub-clause. D E F

In this writ petition, Sri Palkhivala contends that inasmuch as three important circumstances were not brought to the notice of this Court by the counsel appearing for the assesseees in *Budharaja & Co.* and were, therefore, not considered by this Court, the decision in so far as it relates to Section 32- A(2)(b)(iii) requires reconsideration and must be referred to a larger Bench. Had the said three circumstances been brought to the notice of this Court, says Sri Palkhivala, the decision would certainly have been different. The three circumstances mentioned by the learned counsel H

A are the following :

(A) That the word "construction" occurring in the said sub-clause should be read independent of and not in association with the words following, viz., "manufacture or production of any article or thing". Learned counsel says that if so read disjunctively, the word "construction" takes within its sweep all types of construction including the construction of dams, buildings, bridges, roads and the like. Learned counsel brought to our notice the opinion of the Law Ministry tendered on February 16, 1984 to the Ministry of Finance and the reply of the Minister of State for Finance to an unstarred question in Parliament (given sometime in 1987-88). The opinion of the Law Ministry, as set out in the writ petition, reads as follows:

"With regard to the above question, it may be stated that S.32A (2) b (iii) refers to any other industrial undertaking for the purpose of business of construction, manufacture or production (of an article) or thing specified in the list in the XI schedule. The expression "construction" occurring in this provision would indicate that it stands independently and does not qualify articles or things. It is intended to cover any new machinery or plant *entitled to* any other industrial undertaking for the purpose of business or construction relating to the industrial undertaking concern".

The reply of the Minister of State for Finance to an unstarred question No. 5495 dated 11.12.1987 reads thus :

"(a) Investment allowance u/s 32A of the Income Tax Act is allowable in respect of new plant and machinery which is installed and used for the purposes of business of construction, manufacture or production of any article or thing.

(b) There has been a difference of opinion regarding the interpretation of this provision as to whether plant and machinery used for the purpose of business of construction is also entitled to this allowance. As a result of the same, the investment allowance is being allowed under the jurisdiction of some other CIT's whereas it is not being allowed in the jurisdiction of some other CIT's.

(c) Some of the benches of ITAT have held that plant and

machinery used for the business of construction is entitled to this allowance. A

(d). The Law Ministry, whose opinion was sought by the government on this issue, is also of the view that plant and machinery used for the business of construction is entitled to this allowance." B

Indeed Sri Palkhivala contended that having accepted the opinion of the Law Ministry, it was not open to the Government of India to have filed or persisted with the appeals in this Court which resulted in the decision in *Budharaja and Co.* Learned counsel submitted that in all fairness, the Government of India ought to have instructed its counsel not to press the said appeals. C

(B) The circular issued by the Central Board of Direct Taxes in the year 1986 [published in 161 I.T.R. (Statutes) 24 to 26] with reference to Section 32-AB which was introduced with effect from April 1, 1987 but which contains identical words. The circular states that the Government of India has introduced a new scheme of Investment Deposit Account with effect from the Year 1986-87 with a view to neutralise the bias in favour of borrowing and needless capacity creation. It then proceeds to state : D

"The new scheme differs from the existing provisions of investment allowance as under :- E

(a) The existing provisions of the investment allowance apply to only those assessee:-

(i) who purchase a ship or aircraft, which is first put to use in the business of the assessee; or F

(ii) who install new machinery or plant in an industrial undertaking for the purposes only of business of construction, manufacture or production of any article or thing not specified in the Eleventh Schedule to the Income-tax Act. G

In the case of small scale industrial undertaking, this benefit is not denied even if such an undertaking produces a non- priority item listed in the Eleventh Schedule, like alcoholic spirits, tobacco preparations, cosmetics, etc. H

- A The new scheme is applicable to all existing types of assesseees as also to the professionals and the leasing companies which have not leased out machinery to those industrial undertakings other than a small scale industrial undertaking, engaged in the manufacture or production of articles or things listed in the Eleventh Schedule to the Income-tax Act. In other words, the deduction is admissible to all the assesseees who carry on "eligible business or profession", which as per section 32AB(2) means business or profession other than the business of construction, manufacture or production of any article or thing specified in the list in the Eleventh Schedule (in case it is not a small scale industrial undertaking) and the business of leasing or hiring of machinery or plant to an industrial undertaking other than a small scale industrial undertaking engaged in the business of low priority items as specified in the list in the Eleventh Schedule. *If may be clarified that the business of construction is an eligible business for the purposes of this provision.*"
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(C) The fact that this court had in *Commissioner of Income Tax v. Bhageeratha Engineering Limited*, (1993) I.T.R. 12, taken a view contrary to the one taken in *Budharaja and Co.* with respect to Section 32A(ii)(b)(iii). The judgment in *Bhageeratha Engineering Ltd.* reads as follows :

- E "Heard learned counsel on both sides. The question of law formulated for the opinion of the High Court on a reference under section 256 of the Income-tax Act, 1961, pertains to the entitlement of the assessee to the investment allowance under section 32A of the Act. The High Court held (see [1992] 193 ITR 674, 680) :
- F

- G "The Tribunal further found that since the machinery was used in an industrial undertaking in the business of construction, manufacture or production of articles or things, the assessee is entitled to investment allowance under section 32A of the Act. The finding that the assessee is engaged mainly in the manufacture or processing of goods and is an industrial undertaking is not in challenge before us. Admittedly, the assessee is a construction company and for the purpose of the manufacturing activities performed by it, it used the machinery in its business of construction It is not open to the Revenue to contend in these references that the
- H

assessee-company is not an industrial undertaking, since the finding of fact in that regard entered by the Tribunal, has not been expressly challenged by an appropriate question raised in the reference..

The contention of the assessee (sic) in relation to the construction activity carried on by him cannot be said to be an industrial undertaking, becomes irrelevant.

With this finding, the special leave petition is dismissed."

We are of the considered opinion that none of the contentions urged by Shri Palkhivala calls for reconsideration of this Court's judgment in *Budharaja and Co.* We proceed to give our reasons with respect to each of the three grounds/contentions urged by the learned counsel.

Re : contention (A) :

In our opinion, the word "construction" occurring in the said sub-clause cannot be read independently, torn from its context. In so far as it is relevant, the provision reads thus :

"The ship or aircraft or machinery or plant referred to in sub-section (1) shall be the following, namely:.....(b) any new machinery or plant installed after the 31st day of March, 1976,..... (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."

This Court explained in its judgment in *Budharaja and Co.* the reason for which the word "construction" was used in the corresponding sub-clause prior to April 1, 1978, viz., sub-clause (ii) of clause (b) of sub-section (2), which referred to articles and things in the Ninth Schedule and the legislative change brought about by Finance (No.2) Act of 1977 with effect from April 1, 1978. It is pointed out therein that the former sub-clause (ii) which applied only to the articles and things in the IXth Schedule - all of which were movables including ships - now became sub-clause (iii) which applies to all articles and things other than those mentioned in the Eleventh Schedule. The following discussion in the said judgment brings out the ratio;

A "Though at first sight, the use of the words "construction" and
"thing" appear to lend some substance to the contention of learned
counsel for the assessee, a deeper scrutiny - and in particular, the
legislative history of the relevant provisions - militates against the
acceptance of his submission. Sub-clauses (ii) and (iii) of clause
B (b) of sub section (2) of Section 32A were substituted by the
Finance (No. 2) Act of 1977, with effect from April 1, 1978. Prior
to the said amendment, the sub-clauses read as follows :

C "(ii) for the purposes of business of construction, manufacture or
production of any one or more of the articles or things specified
in the list in the Ninth Schedule; or

(iii) in a small-scale industrial undertaking for the purposes of
business of manufacture or production of any other articles or
things."

D The unamended sub-clause (ii), which corresponds to present
sub-clause (iii), was thus confined to the "articles and things" in
the Ninth Schedule. The Ninth, Schedule, since omitted, contained
as many as 33 items. Item 15 therein related to "ships". All the
items referred only to movables; none of them refers to an immov-
able object like a building, factory or bridge. Since the appropriate
E word in the case of ships is "construction" - in common parlance
one speaks of construction of ships and not manufacture of ships
- the Legislature used the expression "construction" in unamended
sub-clause (ii). The said sub-clause also referred to "articles or
things", which is the heading of the Ninth Schedule. After amend-
F ment, sub-clause (ii), which became sub-clause (iii), underwent a
certain change. Not only were the words "in any other industrial
undertaking" added at the beginning of the sub-clause, the ap-
plicability of the sub-clause was extended to all articles and things
except those articles and things mentioned in the Eleventh
G Schedule. The heading of the Eleventh Schedule is again "list of
articles or things", but the list does not include "ships". In other
words, sub-clause (iii), after amendment, continues to apply to
ships. Ships are among the articles or things to which the present
sub-clause (iii) applies. And that is precisely the reason the word
"construction" is retained in amended sub-clause (iii) - the sub-
clause corresponding to unamended sub-clause (ii). So far as the
H use of the word "thing" is concerned, it has no special significance

inasmuch as both the Ninth Schedule and the Eleventh Schedule contain a list of articles or things. Both the Ninth Schedule, to which alone the unamended sub-clause (ii) applied, as well as the Eleventh Schedule, the articles and things wherein are excluded from the purview of amended sub-clause (iii), refer only to movable objects - called articles or things. In this background, it is not possible or permissible to read the word permissible to read the word "construction" as referring to construction of dams, bridges, buildings, roads or canals. The association of words in former sub-clause (ii) and the present sub-clause (iii) is also not without significance. The words are: "construction, manufacture or production of any one or more of the articles and things" and "construction, manufacture or production of any articles and things.....", respectively. It is equally evident that in these sub-clauses as well as in the Ninth Schedule and the Eleventh Schedule, the words "articles" and "things" are used interchangeably. In the scheme and context of the provision, it would not be right to isolate the word "thing", ascertain its meaning with reference to law lexicons and attach to it a meaning which it was never intended to bear. A statute cannot always be construed with the dictionary in one hand and the statute in the other. Regard must also be had to the scheme, context and-as in this case - to the legislative history of the provision. We are, therefore, of the opinion that sub-clause (iii) of clause (b) of sub-section (2) of section 32A does not comprehend within its ambit construction of a dam, a bridge, a building, a road, a canal and other similar constructions."

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-clause (iii) because the ships continue to be within the purview of present sub-clause

- A (iii) as they were within the purview of former sub-clause (ii). It is not necessary to repeat the reasoning in *Budharaja & Co.* over again.

There is another indication in Section 32A which tends to support our opinion, viz., sub-section (2A) of Section 32A. It was inserted by Finance (No.2) Act, 1977 by way of an amendment. The object of this amendment was stated in the Notes on Clauses of Finance (No. 2) Bill, 1977 as follows :-

- B "New sub-section (2A) seeks to provide that the deduction in respect of investment allowance shall not be denied in respect of machinery or plant installed and used *mainly* for the purposes of business of construction, manufacture or production of any article or thing merely on the ground that such machinery or plant is used *in part* for the purposes of business of construction, manufacture or production of any article or thing specified in the list in the Eleventh Schedule."

- D Sub-section (2A) of Section 32A makes it clear that if any machinery or plant is used mainly for the purpose of business of construction, manufacture or production of any article or thing which does not fall within the prohibited list in the Eleventh Schedule, it will qualify for deduction under Section 32A. The deduction will not be denied only because such machinery or plant is also used for the purpose of business of construction, manufacture or production of any article or thing included in the prohibited list. Sub-section (2A) of Section 32A is clarificatory in nature. It clarifies that machinery or plant mainly used *inter alia*, for construction of articles or things which are not included in the prohibited list, will qualify for deduction under Section 32A, notwithstanding the fact that such machinery or plant is also used for construction of articles or things contained in the prohibited list.

- G If the word 'construction' is not to be associated with the phrase 'any article or thing', then it was not necessary to use the phrase 'construction, manufacture or production of any article or thing' in the clarificatory sub-section (2A). It will then have to be held that the word 'construction' in sub-section (2A) is redundant and a mere surplusage.

- H So far as opinion of the Law Ministry and the reply of the Minister of State for Finance in the Parliament is concerned, we are of the opinion

they are not of much relevance on the construction of the said sub-clause by this Court. The opinion of the Law Ministry may be in favour of the assessee or may be against the assessee. Similarly the answer given by the Minister may be in favour of the assessee or against him. They are mere opinions and cannot be treated as binding upon the Courts. It is not even suggested that the said opinion was communicated to the assessing authorities.

So far as the contention of Sri Palkhivala that in view of the said answer given by the Minister of State for Finance in the Parliament, the Government of India ought to have instructed its counsel not to file the said appeals or that it ought to have instructed its counsel not to press the said appeals is concerned, we are of the opinion it is not a matter which concerns the Court nor does it reflect upon the correctness of the interpretation placed by this Court upon the said sub-clause. What transpired or what did not transpire between the government and its counsel is a matter between them. We have no say in the matter.

We are, therefore, of the opinion that even if the facts and circumstances mentioned under contention (A) urged by Shri Palkhivala had been brought to the notice of this Court, it could not have led to a different result. We are also of the opinion that this contention does not call for reconsideration of the decision in *Budharaja & Co.*

Re : (B) :

We are equally of the opinion that circular of the C.B.D.T. issued in the year 1986 explaining the provisions in Section 32AB does not in any manner help the assessee. A careful reading of the last paragraph in the extract quoted hereinbefore shows that the new scheme contained in Section 32AB is "admissible to all the assesseees who carry on "eligible business or profession" which as per Section 32-AB(2) means business or profession other than the business of construction manufacture or production of any article or thing specified in the list in the Eleventh Schedule (in case it is not a small-scale industrial undertaking) and the business of leasing or hiring of machinery or plant to an industrial undertaking other than a small-scale industrial undertaking engaged in the business of low priority items as specified in the list in the Eleventh Schedule". Having so said, the circular stated: "it may be clarified that the business of construction is eligible business for the purposes of this provision." It is this

- A sentence, the last sentence in the paragraph, which is strongly relied upon and emphasised by Sri Palkhivala as supporting his contention. For a proper appreciation of the said circular, it is necessary to notice the scheme of Investment Deposit Account introduced by Section 32-AB with effect from April 1, 1987. If the assessee deposits any amount in his account maintained by him with the Development Bank within the period specified therein or utilise any amount during the previous year for the purchase of articles mentioned therein, he becomes entitled to a deduction specified in the Section. Sub-section (4) states that no deduction under sub-section (1) of the said section shall be allowed in respect of any amount utilised for the purchase of - "(e) any new machinery or plant to be installed in an industrial undertaking, other than a small-scale industrial undertaking, as defined in section 80HHA, for the purposes of business of construction, manufacture or production of any article or thing specified in the list in the Eleventh Schedule". The Circular was evidently referring to this provision in the paragraph referred to above. We may also say that the sentence emphasised by Shri Palkhivala merely says that "business of construction is an eligible business" for the purposes of Section 32AB. It does not clearly say that construction of all types is included. In the circumstances we are of the opinion that the said circular issued with reference to a different provision and explaining a different scheme altogether can have no significant relevance as an instruction or direction under Section 119 vis-a-vis Section 32A. The relevance, if any, is only inferential - and, therefore, remote. It is significant that the said circular also deals with Section 32A but no such statement is contained therein. We are, therefore, of the opinion that Even if the said circular had been brought to the notice of this Court, it could not have made any difference.

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Re : (C) :

- We have set out the judgment of this Court in *Bhageeratha Engineering Ltd.* in full hereinbefore. This Court dismissed the Revenue's appeal in view of the finding recorded by the Tribunal (which finding was accepted by the High Court) that "the assessee is engaged mainly in the manufacture or processing of goods and is an 'industrial undertaking'". The Tribunal had also found that the assessee had used the machinery in the business of construction, and the said finding was not challenged before the High Court. In the above circumstances, the High Court opined that it was not open to the Revenue to contend before it that the assessee-company was

not an 'industrial company'. The extract from the High Court's judgment quoted in this Court's order clearly shows that the contention of the Revenue was that the assessee was not an 'industrial company' and that the interpretation of the words "construction, manufacture or production of any article or thing not being an article or thing specified in the list in the Eleventh Schedule" was not really in issue therein. It therefore, cannot be said that this Court has taken a different view on the interpretation of the said words in *Bhageeratha Engineering Ltd.* Indeed, Sri Palkhivala did not seriously press this point. A B

For the above reasons, the writ petition is dismissed.

A.G.

Petition dismissed. C