CASE NO.:
Appeal (civil) 2600-03 of 1994
Appeal (civil) 3788 of 1999

PETITIONER:
THE COMMISSIONER OF INCOME TAX

Vs.

RESPONDENT:
BOMBAY BURMAH TRADING CORPORATION

DATE OF JUDGMENT: 15/02/2000

BENCH:
D.P.Wadhwa, S.S.M.Quadri

JUDGMENT:

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J U DG M E N T

SYED SHAH MOHAMMED QUADRI,J.

In these five appeals the parties are common; the Revenue is the appellant and the assessee is the respondent. C.A.Nos.2600-03 of 1994, which relate to the assessment years 1967-68 to 1970-71, arise from the judgment and order of the Division Bench of the High Court of Judicature at Bombay in Income-Tax Reference No.242 of 1976 dated December 12, 1988. Following that judgment the Division Bench disposed of Income Tax Reference No.10 of 1987 which pertains to the assessment year 1974- 75 on July 30, 1998 which is under challenge in Civil Appeal No.3788 of 1999. The common substantial question of law, which arises in these appeals, is question No.2 noted below. Briefly stated, the facts giving rise to these appeals are as follows : The respondent-assessee is an Indian resident company. It is carrying on the business of exporting tea. In the aforementioned assessment years it claimed weighted deduction under Section 35-B of the Income-tax Act (for short the Act) in respect of the expenditure of Rs.1,95,935/- incurred on export of tea from East Africa to the United Kingdom. The claim was disallowed by the Income-tax Officer on the ground that Section 35-B would apply only if the exports were made from India. That view was upheld by the Appellate Assistant Commissioner and the

Income-tax Appellate Tribunal. Among others, the following two questions in Income Tax Reference No.242 1976 and question No.2. in Income Tax Reference No.10 of 1987 were referred to the High Court of Judicature at Bombay by the Income-tax Appellate Tribunal under Section 256(1) of the Act : (1) Whether on the facts and in the circumstances of the case, the provisions of Section 40(c)(iii)/40(a)(v) applied in the case of the employees of the Assessee in its overseas branches?

(2) Whether on the facts and in the circumstances of the case, the assessee is entitled to weighted deduction under Section 35-B in respect of the expenditure of Rs.1,95,935/- incurred on export of tea from East Africa to the United Kingdom?

The first question was answered in the negative i..e. in favour of the assessee and against the Revenue following the judgment in the case of the respondent-assessee for the earlier assessment years in Bombay Burmah Trading Corporation Ltd. vs. Commissioner of Income Tax, Bombay City-IV [(1984) 145 ITR 793]. It is conceded by the learned counsel for the parties that this question is covered against the Revenue by the judgment of this Court in Commissioner of Income Tax vs. Continental Construction Ltd. [(1998) 230 ITR 485] affirming the judgment in Continental Construction Ltd. vs. Commissioner of Income Tax [(1990) 185 ITR 178]. Adverting to the second question, the High Court answered it in the affirmative i.e. in favour of the assessee and against the Revenue. It will be apt to refer to Section 35-B of the Act, which is the subject-matter of debate in all the five appeals.

35-B. Export Markets developments allowance -- (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, but before the 1st day of March, 1983, 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;

(b) The expenditure referred to in clause (a) is that incurred wholly and exclusively on

(i) advertisement or publicity outside India in respect of the goods, services or facilities which the assessee deals in or provides in the course of his business..;

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(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.

On a plain reading of the provision of sub-section (1), extracted above, it is clear that to claim the benefit of this section the following conditions have to be

satisfied : (i) the assessee must be a domestic company which is resident in India; (ii) it must have incurred expenditure after February 29, 1968 but before March 1, 1983; (iii) such expenditure should not be in the nature of capital expenditure or personal expenses of the assessee; (iv) the expenditure might have been incurred either directly or in association with any other person; and (v) the nature of the expenditure must answer the description referred to in any one of the sub-clauses of clause (b). On these requirements being satisfied the assessee-company becomes entitled to the weighted deduction under Section 35-B. It is not necessary that the export should be directly ex-India (from India). The Tribunals reading of the section that the export should be ex-India is not supported by the language of the provision or any authority. The High Court has, therefore, rightly concluded that to avail the benefit of weighted deduction the provision does not require that the export should be ex-India. It must be observed in fairness to Mr.M.L.Verma, learned senior counsel appearing for the Revenue, that he does not seriously dispute this proposition. Once this position is accepted, the order under challenge has to be sustained. However, what Mr.Verma contends is that the respondent claims the expenditure under sub-clause (viii) for which there is no factual finding by the Tribunal. The High Court, submits Mr. Verma, has gone wrong in recording a fresh finding -- the expenditure was incurred with regard to the performance of the service outside India i.e. from East Africa to United Kingdom in connection with the execution of contract for supply of tea in the United Kingdom -- and on that basis upholding the claim of the respondent under Section 35-B; his further submission is neither the High Court nor this Court can do so without calling for a supplementary statement from the Tribunal on this aspect of the fact. Mr.Ranjit Kumar, learned counsel appearing for the respondent- assessee company, invited our attention to the orders passed by the Income-Tax Officer, the Commissioner and the Tribunal and contended that there was no dispute with regard to the nature of the expenditure and therefore Mr.Vermas contention has to be rejected. We have perused the orders of the Income Tax Officer, the Commissioner, the Appellate Assistant Commissioner and the Tribunal as also the order under appeal passed by the High Court. Though a copy of the return containing details of the expenditure claimed by the respondent under the above provision has not been placed on record, the orders of the departmental authorities as well as of the Tribunal and of the High Court leave us in no doubt that the weighted deduction under Section 35-B was claimed in respect of the expenditure incurred with regard to the performance of the services outside India i.e. in East Africa and United Kingdom in connection with the execution of the contract for the supply of tea in the United Kingdom. Indeed, the said fact is embodied in question No.2 itself. In view of the position, pointed out above, we find no illegality in the orders under challenge in these appeals. The appeals are accordingly dismissed with costs.