2009:DHC:9320-DB

* IN THE HIGH COURT OF DELHI AT NEW DELHI

\+ ITA No. 1287 of 2008

% *Reserved on : September 17, 2009*
Pronounced on : October 30, 2009

Ansal Housing & Construction Ltd. . . . Appellant

through : Mr. Ajay Vohra with
Ms. Kavita Jha and
Mr. Sriram Krishna, Advocates

VERSUS

Commissioner of Income Tax . . . Respondent

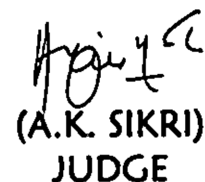
through : Mr. Subhash Bansal, Advocate

CORAM :-
THE HON'BLE MR. JUSTICE A.K. SIKRI
THE HON'BLE MR. JUSTICE VALMIKI J. MEHTA

1. Whether Reporters of Local newspapers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the Judgment should be reported in the Digest?

A.K. SIKRI, J.

For orders, see ITA No. 1261/2008.



(A.K. SIKRI)
JUDGE

(VALMIKI J. MEHTA)
JUDGE

October 30, 2009
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* IN THE HIGH COURT OF DELHI AT NEW DELHI

\+ ITA No. 1261 of 2008
ITA No. 1278 of 2008
ITA No. 1287 of 2008
ITA No. 1402 of 2008

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CORAM :-
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THE HON'BLE MR. JUSTICE VALMIKI J. MEHTA

1. Whether Reporters of Local newspapers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the Judgment should be reported in the Digest?

Yes

A.K. SIKRI, J.

1. In all these appeals, common question of law which arises for consideration, which relate to interpretation of Section 35-D of the Income Tax Act, 1961 (hereinafter referred to as the 'Act'). For the purpose of convenience, we are taking note of the facts of ITA No. 1261/2008.

2. The appellant is a widely held public limited company engaged in the business of construction and sale of multi storeyed residential

two issues of shares for public subscription to augment its working capital, namely, a right issue (48,21,300 equity shares of Rs.10/- each @ a premium of Rs.12.50/- each, aggregating to Rs.10,84,79,250/-) and a public issue (24,19,900 equity shares of Rs.10/- each @ a premium of Rs.15/- each aggregating to Rs.6,14,97,500/-). Expenditure of Rs.49,13,479.85 was incurred towards the right issue and Rs.75,06,601.80 towards the public issue.

3. For the previous year relevant to the assessment year 1998-99, the appellant company filed its return of income on 30.11.1998 disclosing total income of Rs.6,57,26,910/-. The assessment was completed under Section 143(3) of the Act on 26.3.2001 wherein the Assessing Officer (AO) disallowed the expenses claimed by the appellant as revenue expenditure.

4. Being aggrieved by the aforesaid order, the appellant filed an appeal before the Commissioner of Income Tax (Appeal). The CIT(A), vide order dated 7.8.2003, confirmed the action of the AO. The appellant preferred the appeal before the Income Tax Appellate Tribunal (for short, the 'Tribunal'). The Tribunal vide order dated 11.4.2008 held that the appellant is not an *'industrial undertaking'* and, therefore, not entitled to deduction under Section 35-D of the Act. Still dissatisfied, present appeal is preferred under Section 260A of the Act.

affects the capital structure of the business. Therefore, su expenditure, being of capital nature, is not admissible to deduction as business expenditure since the same is not treated as revenue deduction. However, by Taxation Laws (Amendment) Act, 1970, the Legislature introduced Section 35-D of the Act, which came into force with effect from 1.4.1971. It enables amortization of specified preliminary expenses, which are otherwise not admissible deductions. Expenditure on issue of shares of public subscription is one such expenditure. Section 35-D, however, applies in two circumstances:

(a) pre-business expenses, i.e. expenses incurred before the commencement of business, and

(b) expenses incurred in connection with the extension of industrial undertaking or in connection with setting up a new industrial unit by an establishment which is already in business.

These are the expenses which are incurred even after the commencement of business, but are admissible only to a business which is an *'industrial undertaking'*. This becomes manifest from the reading of Section 35-D of the Act, which is reproduced below :-

"35D Amortisation of certain preliminary expenses –

(1) Where an assessee, being an Indian company or a person (other than a company) who is resident in India, incurs, after the 31st day of March, 1970, any expenditure specified in sub-section (2). -

(i) before the commencement of his business, or
(ii) after the commencement of his business, in

amount equal to one-tenth of such expenditure for ea of the ten successive previous years beginning with t previous year in which the business commences or, as the case may be, the previous year in which the extension of the industrial undertaking is completed or the new industrial unit commences production or operation........"

6. Circular No. 56 dated 19.7.1971 containing explanatory notes on the Taxation Laws (Amendment) Act, 1970 clarifies the Legislative intent behind insertion of Section 35D of the Act on the statute in the following terms :-

"42. Sec. 8 of the Amending Act has introduced two new ss. 35D and 35E, w.e.f. 1st April, 1971. New s. 35D provides for the amortization of certain preliminary expenses incurred by an Indian company or a resident assessee other than a company before the commencement of business or in connection with the extension of an industrial undertaking or the setting up of a new industrial unit. The amortization will be allowed against the profits of the company or other taxpayer in 10 equal instalments over a period of 10 years beginning with the previous year in which the business commences or, as the case may be, the previous year in which the extension of the industrial undertaking is completed or the new industrial unit commences production or operation. Such amortization will be allowed only in respect of expenditure incurred after 31st March, 1970 under specified heads. The heads of qualifying expenditure specified for this purpose are the following:

xxx xxx xxx

45. It may be noted that the provision for amortization is not intended to supersede any other provision in the income – tax law under which the expenditure is allowable as a deduction against profits. For instance, where a company which is already in business, incurs expenditure on issue of debentures, and such expenditure is admissible as a deduction against profits of the year in which it is incurred by virute of the decision of the Supreme Court in the case of India Cements Ltd. v. CIT (SC) [1996] 60 ITR 52, s. 35D will not have the effect of bringing that expenditure within the scope of the expenditure to be amortised against profits over a 10-year period. As a corollary to this, where any expenditure has been included for the purpose of amortization under s. 35D on a

7. The appellant, at the time of incurring the aforesaid expendit capital issue, was already in business. Therefore, the said expenses are incurred after the commencement of the business. In such an eventuality, the appellant can claim amortization of the expenses only if it qualifies to be an *'industrial undertaking'*. As noted above, the Tribunal has held that the appellant is not an *'industrial undertaking'* within the meaning of Section 35-D of the Act. This finding of the Tribunal is questioned by the appellant in these appeals and in the aforesaid background, these appeals were admitted and heard on the following common substantial questions of law :-

> "1. Whether on the facts and in the circumstances of the case the Tribunal erred in law in holding that the appellant is not an 'industrial undertaking' and, therefore, not entitled to deduction under section 35D of the Act?
>
> 2. Whether on the facts and in the circumstances of the case the Tribunal erred in law in not appreciating the amendment to section 35D of the Act, vide Finance Act, 2008 is clarificatory in nature and, therefore, should be applicable retrospectively?"

8. We now proceed to determine these questions.

9. <u>Re. – Question No.1</u>

The appellant company is in the business of construction and sale of multiple storey buildings and complexes and in real estate. Whether such a company can be treated as *'industrial undertaking'* is the question. This term *'industrial undertaking'* has nowhere been defined under the Act. However, some other enactments contain the

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"(f) "industrial undertakings" means any undertaki pertaining to a scheduled industry carried on in one or mc factories by any company but does not include-

> (i) an ancillary industrial undertaking as defined in clause (aa) of section 3 of the Industries (Development and Regulation) Act, 1951 (65 of 1951); and
> (ii) a small scale industrial undertaking as defined in clause (j) of the aforesaid section 3;"

(ii) Section 2(d) of the Industries Development and Regulation Act.

(iii) The Industrial Disputes Act, 1947 also contains the definition of *'industry'* in Section 2(j) as well as *'industrial undertaking'* in Section 2(ka). As per Section 2(ka), *'industrial undertaking'* means – *"an establishment or undertaking in which any industry is carried on."*

10. We may state at the outset that the objective with which the aforesaid statutes are enacted is different and in the context thereof the definition to this term is provided by various Act. Therefore, it cannot be safe to rely upon one or the other definition contained in the aforesaid statutes. Notwithstanding the same, one common thread which is found in all these definitions is that those establishments or undertakings are treated as *'industrial undertakings'* in each of the aforesaid statutes, which are *'factories'* and carrying on some manufacturing activity.

11. In the absence of any definition provided under the Income Tax Act

common persons or its natural and grammatical manner. Lexicon, the Encyclopedia Law Dictionary (1997 Edition), provides the following meaning :-

> "Industrial Undertaking –
>
> To be an industrial undertaking, the work of manufacture or production should be carried on in one or more factories by person or authority including Government."

Likewise, Wharton's Law Lexicon (Dictionary) (15th Edition) defines this expression as –

> "any undertaking pertaining to a scheduled industry carried on in one or more factories by any company but does not include-
>
> (i) An ancillary industrial undertaking as defined in clause (aa) of section 3 of the Industries (Development and Regulation) Act, 1951; and
>
> (ii) a small scale industrial undertaking as defined in clause (j) of the aforesaid section 3. [Sick Industrial Companies (Special Provision) Act, 1985 (1 of 1986), section 3(1)(f)]
>
> Means any undertaking pertaining to a scheduled industry and includes an undertaking engaged in any other industry, or in any trade, business or service which may be regulated by Parliament by law. [Central Industrial Security Force Act, 1968 (50 of 1968) section 2(1)(b)].
>
> Means any undertaking pertaining to a scheduled industry carried on in one or more factories by any person or authority including Government. [Industrial (Development and Regulation) Act, 1951 (65 of 1951), section 3(d)]."

12. Going by the dictionary meaning as well, one would find that industrial undertakings take their flavour from the manufacturing or production activities carried by factories. The expression *'industrial undertaking'* appears in Section 54-D of the Act as well and the Kerala High Court also had an occasion to expound this term in the

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words *'industrial undertaking'* should be given in the absence statutory definition.

13. To this extent, there is no quarrel. However, Mr. Ajay Vohra, learned counsel for the appellant submitted that wide meaning should be given to the expression *'industrial undertaking'* as was done by the Kerala High Court, which is clear from the following discussion contained in the said judgment :-

> "5. What then is an "industrial undertaking"? The Income-tax Act does not define what is "an undertaking" or what is. an "industrial undertaking". It has, therefore, become necessary to construe these words. Words used in a statute dealing with matters relating to the general public are presumed to have been used in their popular rather than their narrow, legal or technical sense. Loquitur ut vulgus, that is, according to the common understanding and acceptation of the terms, is the doctrine that should be applied in construing the words used in statutes dealing with matters relating to the public in general. In short, if an "Act is directed to dealings with matters affecting everybody generally, the words used have the meaning attached to them in the common and ordinary use of language." (Vide Unwin v. Hanson [1891] 2 QB 115 , per Lord Esher M. R. at page 119). That the Income-tax Act is of general application, is beyond dispute. It, therefore, follows that the meaning that should be given to these words "industrial undertaking" must be the natural meaning. It is all the more so because the Income-tax Act is one consolidating and amending the law relating to income-tax and super tax. (See Rao Bahadur Ravulu Subba Rao v. Commissioner of Income tAx (1956) 30 ITR 163 (SC) at 169).
>
> 6. "Undertaking" in common parlance means an "enterprise", "venture", "engagement". It can as well mean "the act of one who undertakes or engages in a project or business" (Webster). An undertaking mentioned in Section 54D must be one maintained by a person for the purpose of carrying on his business. "Undertaking" for the purpose of this section, however, must bean "industrial undertaking". The demonstrative adjective "industrial" qualifying the word "undertaking" unmistakably and with precision shows that the undertaking must be one which partakes of the character of a

".........being land or building or any right in land or buildi forming part of an industrial undertaking belonging to assessee which, in the two years immediately preceding the date on which the transfer took place, was being used by the assessee for the purposes of the business of the said undertaking....... " (emphasis supplied)

is profitable. The word "business" has been denned in the Income-tax Act. The definition reads :

" 'Business' includes any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture."

7. Construing this word "business", the Supreme Court in Narain Swadeshi Weaving Mills v. Commissioner of Excess Profits Tax [1954]26ITR765(SC) has observed that "the word "business" connotes some real, substantial and systematic or organised course of activity or conduct with a set purpose." Endorsing this construction, the Supreme Court in a later decision in Mazagaon Dock Ltd. v. Commissioner of Income Tax (1958) 34 ITR 368 has observed (at page 376) :

"The word 'business' is, as has often been said, one of wide import and in fiscal statutes it must be construed in a broad rather than a restricted sense."

8. The words "industrial undertaking" therefore, should be understood to have been used in Section 54D in a wide sense, taking in its fold any project or business a person may undertake. The "running of a lodge", by the assessee, therefore, can be said to be an "industrial undertaking" within the meaning of Section 54D of the Income-tax Act."

14. Mr. Vohra also referred to the judgment of the Bombay High Court in *Ship Scrap Traders* v. *Commissioner of Income Tax,* 251 ITR 806. This case concerns with the deductions under Section 80HHA and 80IA of the Act, which are available to an *'industrial undertaking'* engaged in manufacture or production of an article or a thing. While holding that the assessee would be entitled to deduction under the aforesaid provision as it was engaged in the activity of ship breaking

"The Income-tax Act does not define the expression "industrial undertaking". Therefore, reference to its definition in similar enactments or adoption of its ordinary meaning is inevitable. Considering the object of the enactment of the provision under consideration, the said expression will have to be construed liberally in a broader commercial sense, keeping its object in mind. There is not much debate on this aspect of the matter. The concept of industrial undertaking need not necessarily be confined to manufacture and production of articles and even in the absence of either of them there could be an industrial undertaking........"

15. Mr. Vohra also relied upon another judgment of the Bombay High Court in the case of *Commissioner of Income Tax* v. *Emirates Commercial Bank Ltd.*, 262 ITR 55. In that case, the Bombay High Court held that the branch of a foreign bank existing in India was entitled to investment allowance under section 32A of the Act with respect to computers installed in the bank. The deduction under the said section is available to an "industrial undertaking" engaged in manufacture or production of an article or a thing. The assessee's submission in that case was that as long as the assessee used these computers for production of articles and things it could be regarded as an *'industrial undertaking'* and this submission of the assessee was accepted by the Court.

16. From the discussion up to now, it follows that:

(a) industrial undertaking is to be given the meaning which is understood in common parlance, and

(b) which should be interpreted widely.

At the same time, we have to bear in mind that the expression

to be further discerned as to whether the business of constr activity would be treated as an *'industrial undertaking'* or not.

17. In *P. Alikunju M.A. Nazeer Cashew Industries* (supra), the Kerala High Court rightly pointed out that an *'undertaking'* must be one which partakes the character of a business. However, what we find is that though the demonstrative adjective *'industrial'* which qualifies the word *'undertaking'* was taken note of while answering the question, no significance was attached to the said expression *'industrial'* and the case is decided by relying upon the meaning of the expression *'undertaking'* alone. Interestingly, in the two judgments of the Bombay High Court, taken note of above, the Court came to the conclusion that the activities involved in those cases amounted to manufacture or production of an article or a thing.

18. Therefore, we are of the opinion that common sense approach will have to be adopted and those undertakings would qualify as '*industrial undertakings*' which are involved in '*manufacturing activity*'.

19. The activity of construction can, by no stretch of imagination, be treated as manufacturing activity as it does not amount to manufacture or production of an article or a thing. Law in this behalf stands settled by the judgment of the Supreme Court in the case of *Commissioner of Income Tax, Orissa & Ors. v. M/s. N.C. Budharaja*

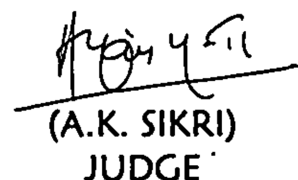
(Appeals), Chandigarh & Anr., 289 ITR 26, held that the bus civil construction would not amount to carrying on any manufacturing activity. Even this Court in *Ansal Housing & Estates (P) Ltd.* v. *Commissioner of Income Tax*, 1999 (77) DLT 765, opined that the business of construction of building will not fall within the ambit of industrial company. This appears to be a case of sister concern of the present assessee itself, but, unfortunately, our attention was not even drawn to this judgment by the counsel on either side.

In these circumstances, we answer Question No. 1 formulated above against the assessee and in favour of the Revenue.

20. Re. – Question No.2

Since the appellant does not qualify to be an industrial undertaking, whether amendment to Section 35D of the Act is clarificatory in nature or applies retrospectively will not have any bearing. Therefore, it is not necessary to decide this question in the facts of this case.

21. Accordingly, these appeals preferred by the assessee are dismissed with costs of Rs.15,000/- in each of the four appeals.



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