

COMMISSIONER OF INCOME TAX

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v.

M/S. ALCOCK ASHDOWN AND CO. LTD. ETC.

FEBRUARY 5, 1997

[B.P. JEEVAN REDDY AND K.S. PARIPOORNAN, JJ.]

B.

Income Tax Act, 1961

Income Tax—Deductions—Section 84 (since omitted) and Section 80 J—Profits and gains of newly established undertakings—Expression ‘Capital employed in such undertaking’—Interpretation of—Acquisition or purchase of an asset, even though the same was not utilised or put to use during the relevant accounting year, covered—Actual user of the asset irrelevant.

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The Respondent-assessee, a public limited company with a chain of workshops, in the previous year relevant to the assessment year 1962-63, started a new industrial undertaking wherein a good portion of plant and machinery purchased was installed for new business, but some of them aggregating to Rs. 11,95,167 remained to be installed, though paid for. The assessee's claim for relief under section 84 of the Act for an amount of Rs. 21,17,178 (including cost of workshop under construction aggregating to Rs. 9,22,011) was rejected by the Income Tax Officer on the ground that the assets had not been put to use during the accounting year. The findings of the Income Tax Officer was affirmed by the Appellate Assistant Commissioner but set aside by the Income Tax Appellate Tribunal.

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In the appeal filed by the Revenue, it was contended for the appellant that in determining ‘the capital employed in the undertaking’ cost of only those assets used in business should be taken into account.

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For the assessee-Respondent it was contended that a proper interpretation of section 84 read with Rule 19(I) only envisaged that a particular asset should have been a form of capital put into business during the relevant year and does not refer to actual use made of any particular asset.

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Dismissing the appeals, this Court

HELD : 1.1. In view of the provisions of Section 84 of the Income Tax

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A Act, 1961 the moment an asset is acquired or purchased for the purpose of the business, it is capital employed, though the asset as such is not actually utilised or used during the accounting period. [947-B]

1.2. In the chain of events, the earliest act or event is the purchase or acquisition of the asset. That by itself entitled the assessee to get relief.

B The employment of the capital is done or over. The subsequent or later events - including the actual user of the asset has nothing to do in the matter. [947-C]

2. Many High Courts also took a consistent view that Section 84(1) envisages relief to the assessee the moment capital is employed in the undertaking and that it does not state or specify that the asset should be actually used or utilised. [944-H]

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CIT v. Alcock Ashdown & Co. Ltd., 119 ITR 164 (Bom), upheld.

D *Jayaram Mills Ltd. v. CEPT* 35 ITR 651 (Mad) and *Birmingham Small Arms Co. Ltd. v. IRC*, (1951) 2 All ER 296 HL, referred to.

CIT v. Indian Oxygen Ltd., 113 ITR 109 (Cal); *Ravi Machine Tools (P) Ltd. v. CIT*, 114 ITR 459 (Kar); *CIT v. Boehringer Knoll Ltd.*, 148 ITR 70 (Bom); *CIT v. Hindustan Polymers Ltd.*, 156 ITR 860 (Bom); *CIT v. Advani Oerlikon Pvt. Ltd.*, 161 ITR 449 (Bom); *CIT v. Indian Smelting & Refining Co. Ltd.*, 169 ITR 562 (Bom); *CIT v. Elpro International Ltd.*, 177 ITR 20 (Bom); *CIT v. Century Spg. & Manufacturing Co. Ltd.*, 181 ITR 214 (Bom); *CIT v. Mohan Meakin Breweries Ltd.*, 122 ITR 203 (HP); *CIT v. Cibat 1 Ltd.*, 115 ITR 879 (Guj); *CIT v. Sundaram Industries Ltd.*, 166 ITR 35 (Mad); *Periyar Chemicals Ltd. v. CIT*, 162 ITR 163 (Ker); *CIT v. South Agrifurane Industries Ltd.* 174 ITR 697 (Mad) and *CIT v. Gopi Chand Textile Mills Ltd.*, 179 ITR 371 (P & H), approved.

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CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1274 of 1980 Etc.

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From the Judgment and Order dated 27.3.87 of the Bombay High Court in I.T.R. No. 453 of 1975.

Dr. R.R. Mishra, S. Rajappa and S.N. Terdol for the Appellant.

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S. Ganesh, P.D. Tyagi and Ms. A.K. Verma for the Respondents.

The Judgment of the Court was delivered by

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PARIPOORNAN, J. A common question of law arises for consideration in both the appeals. The appeals are preferred against the judgments of the Bombay High Court in I.T.R. No.40 of 1969 dated 7.7.1978 and I.T.R. No. 453 of 1975 dated 27.3.1987. Civil Appeal No. 1274 of 1980 preferred against the judgment of the Bombay High Court in I.T.R. No. 40 of 1969 is the main appeal. The judgment rendered therein is reported in (1979) 119 ITR 164. This judgment was followed in the latter case, I.T.R. No. 453 of 1975.

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2. In Civil Appeal No: 1274 of 1980, the question arose with reference to the assessment year 1962-63, wherein the interpretation of Section 84 of the Income-tax Act, 1961, as it existed then, came up for consideration. Civil Appeal No. 9796 of 1995 is concerned with the assessment year 1969-70, wherein Section 80-J of the Act came up for consideration. It was agreed at the Bar and it is also fairly clear that the controversy in these cases, is regarding the interpretation of the crucial words viz. 'capital employed in the undertaking' occurring both in Sections 84(1) and 80-J of the Income-tax Act (hereinafter referred to as 'the Act').

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3. We heard counsel.

4. It will be sufficient if we advert to the minimal facts in the main appeal - Civil Appeal No. 1274 of 1980. The respondent- assessee is a public limited company. It has a chain of machine workshops. In the previous year (calendar year 1961), relevant for the assessment year 1962-63, the assessee started a new industrial undertaking at Bhavnagar. It was to consist of several workshops, including one for the manufacture of small boats. The undertaking at Bhavnagar started business operations in the year of account. The profit for this year was Rs. 5,39,791. A good portion of the plant and machinery was installed for the new business operations, but some of them remained to be installed, though they were paid for. Some of the workshops were still under construction. The value of the plant and machinery not installed came to Rs.11,95,167, while the cost of the workshop under construction came to Rs. 9,22,011. The aggregate for the above two items came to Rs. 21,17,178. The assessee claimed relief for this amount under Section 84 of the Act as "capital employed in the new industrial undertaking" at Bhavnagar. The Income-tax Officer declined to afford the relief claimed on the ground that the assets had not been put to

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A use during the accounting period. The appeal filed before the Appellate Assistant Commissioner was futile. In second appeal filed by the assessee, the Appellate Tribunal held that the industrial undertaking at Bhavnagar formed an integral whole and the new workshops under construction remaining to be installed were part and parcel of that undertaking. The Appellate Tribunal also held that the business of the industrial undertaking at Bhavnagar had already commenced and was being carried on during the year of account. The Tribunal further held that it was not in dispute that the assets in question could not be segregated from the industrial undertaking at Bhavnagar. These are the basic findings of the Appellate Tribunal. On the basis of the above findings, the Tribunal concluded that

B "the capital employed in the undertaking" has to be distinguished from "assets used in the undertaking" and the relief envisaged by Section 84 of the Act is with reference to the capital utilised for the purpose of acquiring the asset for the business and the question as to whether it (the asset) was actually used in the business or not during the relevant year is of no consequence. The Tribunal decided the question in favour of the assessee and held that the aggregate amount of Rs.21,17,178. was includible in the computation of capital for the purpose of granting relief under Section 84 of the Act to the assessee. On motion by the Revenue, the Appellate Tribunal referred the following question of law under Section 256(1) of the Act to the High Court of Bombay :

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"Whether, on the facts and in the circumstances of the case, the amount of Rs: 21,17,178 representing the cost of Workshop under construction, could be taken into account in determining the capital employed in the undertaking at Bhavnagar for the purpose of granting relief to the' company in terms of Section 84 of the Income-tax Act, 1961 for the assessment year 1962-63?"

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5. The High Court of Bombay, by its judgment dated 7.7.1978, considered the rival pleas of the Revenue and the assessee in detail and concurred with the reasoning and conclusions of the Appellate Tribunal and answered the question in the affirmative and in favour of the assessee. Thereafter, this Court granted special leave to the Revenue to appeal to this Court against the aforesaid judgment of the Bombay High Court and that is how the appeal is before us.

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H 6. Section 84(1) of the Income-tax Act, 1961 at the relevant period

read as follows :

"84(1) Save as otherwise hereinafter provided, income- tax shall not be payable by an assessee on so much of the profits or gains derived from any industrial undertaking or hotel to which this section applies as do not exceed six per cent per annum on the capital employed in the undertaking or hotel, computed in the prescribed manner."

(Emphasis supplied)

Rules 19(1) and (6) of the Income-tax Rules, 1962 insofar as they are relevant, provide as follows :

"19. Computation of capital employed in an industrial undertaking or a hotel - (1) For the purposes of section 84, the capital employed in an undertaking or hotel to which the said section applies shall be taken to be -

(a) in the case of assets acquired by purchase and entitled to depreciation -

(i) if they have been acquired before the computation period, their written down value on the commencing date of the said period;

(ii) if they have been acquired on or after the commencing date of the computation period, their average cost during the said period;

(b) in the case of assets acquired by purchase and not entitled to depreciation -

(i) if they have been acquired before the computation period, their actual cost to the assessee;

(ii) if they have been acquired on or after the commencing date of the computation period, their average cost during the said period;

(c) in the case of assets being debts due to the person carrying on the business, the nominal amounts of those debts;

A (d) in the case of any other assets, the value of the assets when they became assets of the business;

Provided that if any such asset has been acquired within the computation period, only the average of such value shall be taken in the same manner as average cost is to be computed

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(6) In this rule, -

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(i) 'average cost' in relation to any asset means such proportion of the actual cost thereof as the number of days of the computation period during which such asset is used in the business bears to the total number of the days comprised in the said period;

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(ii) 'computation period' means the period for which the profits and gains of the undertaking or hotel are computed under sections 28 to 43A....."

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7. Counsel for the appellant (Revenue), Dr. R.R. Misra, contended that the High Court should have read section 84(1) along with Rules 19(1) to (6) of the Income-tax Rules and held that the relief under Section 84 was meant only for assets *actually used* and if the assets are not actually and directly used in the business, the amount representing the cost thereof should not be taken into account in determining the capital employed in the undertaking. On the other hand, counsel for the assessee, Mr. S. Ganesh, submitted that the proper interpretation of Section 84 read with Rule 19(1) of the Rules only envisages that the particular asset should have

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been a form of capital put into the business during the relevant accounting period and does not refer to the actual use made of any particular asset during that period. The emphasis placed by counsel for the Revenue on Rule 19(6) of the Rules has no relevance since reference to Rule 19(6) is called for only in cases where the average cost in relation to an asset arises for consideration.

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8. On examining the rival pleas, we are of the view that the reasoning and conclusion of the High Court does not call for any interference. Section 84(1) of the Income-tax Act is very clear. It affords relief to an assessee as provided therein the moment 'the capital is employed in the

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undertaking'. The Section does not state or specify that the asset should

be actually used or utilised. After advertng to the interpretation placed by the House of Lords on similar or kindred words that occurred in the Finance Act (England) and also the decision of the Madras High Court in *Jayaram Mills Ltd. v. CEPT* 35 ITR 651, wherein similar words were construed with reference to Excess Profits Tax Act, a Division Bench of the Calcutta High Court, in *CIT v. Indian Oxygen Ltd.* 113 ITR 109 at pages 119 and 120, laid down the law, with reference to Section 84 and Rule 19 of the Income-tax Rules, thus :

"Only in the computation of the value of the assets, acquired at or after the commencing date of the computation period, it is necessary to determine their average cost during the entire accounting period and for that purpose only the actual user of the assets in the business becomes relevant. It is quite *clear from the rule* that if an asset is acquired prior to the commencement of the accounting period the question of its user or non-user is entirely immaterial. Whether such an asset is used or not, it will still be included in the capital employed in the business.

Looking at the position from another point of view it appears to us that the *moment capital is utilised for the purposes of acquiring any asset for a business such capital becomes employed in the business*. Whether the asset itself is actually used in the business or not, so far as the capital is concerned, it continues to be employed in the business.

Our view as aforesaid finds support from the observations of the majority of the Law Lords in the case of *Birmingham small Arms Co. Ltd.* (1951) 2 All ER 296 (HL). The Madras High Court has taken the same view in the case of *Jayaram Mills Ltd.* (1959) 35 ITR 651."

(Emphasis supplied)

In the decision under appeal, (Alcock case - 119 ITR 164) the Bombay High Court has followed the above Calcutta decision.

9. Construing the words 'capital employed in the undertaking', a Bench of the Karnataka High Court in *Ravi Machine Tools (P) Ltd. v. CIT*, 114 ITR 459 at page 462, stated the law thus :

A "Section 80J refer to capital employed in an industrial undertaking and not the user of any asset as such. The company acquires an asset for its undertaking and the capital employed in the undertaking is the amount paid to acquire that asset. *The user or non-user of the assets so acquired is immaterial for the computation of the benefit under Sec. 80J.* This is the view that was taken by the High Court of Calcutta in *CIT v. Indian Oxygen Ltd.*, (1978) 113 ITR 109 and also (1959) 35 ITR 651 of the High Court of Madras (*Jayaram Mills Ltd. v. Commissioner of Excess Profits Tax*). In *Indian Oxygen's* case (1978) 113 ITR 109, after referring to the observations of the House of Lords in the case of *Birmingham Small Arms Co. Ltd.* (1951) 2 All ER 296, it was held - See (1978) 113 ITR 109, 120 (Cal).

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D "..... it appears to us that the moment capital is utilised for the purposes of acquiring any asset for a business, such capital becomes employed in the business. Whether the asset itself is actually used in the business or not, so far as the capital is concerned, it continues to be employed in the business."

We entirely agree with this enunciation.....".

E (Emphasis supplied)

We find that the Bombay High Court has consistently followed the decision in *CIT v. Alcock Ashdown & Co Ltd.*, 119 ITR 164, the decision under appeal in the subsequent cases. See - *CIT v. Boehringer Knoll*, 148 ITR 70; *CIT v. Hindustan Polymers Ltd.*, 156 ITR 860; *CIT v. Advani Oerlikon Pvt. Ltd.*, 161 ITR 449; *CIT v. Indian Smelting & Refining Co. Ltd.*, 169 ITR 562; *CIT v. Elpro International Ltd.*, 177 ITR 20 and *CIT v. Century Spinning & Manufacturing Co. Ltd.*, 181 ITR 214. The other High Courts have also followed, either the one or more or all, the decisions reported in *CIT v. Indian Oxygen Ltd.*, 113 ITR 109 Calcutta, *Ravi Machine Tools Pvt. Ltd. v. CIT*, 114 ITR 459 (Karnataka) and the decision under appeal *CIT v. Alcock Ashdown & Co. Ltd.*, 119 ITR 164. See - *CIT v. Cibatul Ltd.*, 115 ITR 879- (Gujarat); *CIT v. Mohan Meakin Breweries Ltd.*, 122 ITR 203 - (Himachal Pradesh); *Periyar Chemicals Ltd. v. CIT* 162 ITR 163 - (Kerala); *CIT v. Sundaram Industries Ltd.*, 166 ITR 35 - (Madras); *CIT v. Southern H Agrifurane Industries Ltd.*, 174 ITR 697-(Madras) and *CIT v. Gopi Chand*

Textile Mills Ltd., 179 ITR 371 (Punjab & Haryana). Our attention was not invited to any decision taking a contrary view.

10. In our opinion, the law laid down in *Indian Oxygen Ltd.'s* case (113 ITR 109) and followed in the decision under appeal, *Alcock Ashdown & Co.'s* case (119 ITR 164) and other cases referred to above represents the correct law on the subject. We are of opinion, that the moment an asset is acquired or purchased for the purpose of the business, it is capital employed, though the asset as such is not actually utilised or used during the accounting year. In the chain of events, the earliest act or event, is the purchase or acquisition of the asset. That by itself entitles the assessee to get the relief. The "employment" of the Capital is done or over. The subsequent or later events - including the actual "user of the asset has nothing to do in the matter. In this view, the judgment under appeal merits no interference. The appeal is accordingly dismissed with costs.

11. In Civil Appeal No. 9796 of 1995, the judgment under appeal has only followed the earlier decision in *Alcock Ashdown & Co.'s* case 119 ITR 164. Since we have already dismissed the appeal preferred by the Revenue against the decision reported in 119 ITR 164 (Civil Appeal No. 1274 of 1980), Civil Appeal No. 9796 of 1995 is also dismissed. There shall be no order as to costs.

The appeals are disposed of as above.

R.D.

Appeals disposed of.