Before Ashok Bhan and N.K. Agrawal, JJ

BECO ENGINEERING CO. LTD,—*Applicant*

versus

COMMISSIONER OF INCOME TAX, ROHTAK,—*Respondent*

I.T.R. Nos. 13 and 14 of 1984

14th August, 1997

Income Tax Act, 1961—Ss. 40-A(5), and 43(1)—Income Tax Rules, 1962—Rl. 3—Reference—Company car in use of employee—Actual expenditure incurred for its use cannot be allowed as deduction in total—Assessing Officer rightly disallowed the expenditure in providing facilities (including other perquisites) in excess of 1/5th of the salary of the employee—When depreciation not sought by the assessee—Assessing Officer not required to allow depreciation—Loss incurred in the exchange rate on machinery bought from abroad—This loss was referable to capital asset, not admissible to revenue expenditure as it was in the nature of capital expenditure—Reference answered in favour of revenue and against assessee.

Held, that expenditure on the provision of a car to an employee is includible in the value of perquisites for the purposes of Section 40A(5) of the Income Tax Act. Value of all perquisites including the facility of car provided to an employee is not to exceed 1/5th of the salary paid to him as laid down in Section 40A(5) of the Act. The aggregate value of all the perquisites is liable to be disallowed to the extent it exceeded the amount equivalent to 1/5th of the salary. The amount of medical reimbursement is, however, not includible in the perquisites. It would, thus,apear that the Assessing Officer did not make any specific disallowance in respect of the value of perquisites relating to the personal use of the car by the employees. The disallowance was made under Section 40A (5) of the Act of the value of the perquisites exceeding 1/5th of the salary. In this situation, there was no calculation of the perquisite value of the car under Rule 3 of the Income Tax Rules. Looking to the disallowance made by the Assessing Officer, the controversy projected in the question referred for opinion does not appear to be the real controversy. It is not the application of Rule 3 of the Income Tax Rules which needs to be examined but it is the disallowance of the value of perquisites in excess of 1/5th of the salary. The question which actually arises from the controversy is whether the Assessing Officer was right in disallowing deduction of the value of perquisites in excess of the 1/5th of the salary paid to the employee. The answer to the question is in the affirmative i.e. in favour of the revenue

and against the assessee.

(Paras 7, 10 to 12)

Further held, that in case depreciation was not sought and claimed by the assessee, the Assessing Officer was not required to allow depreciation.

(Para 14)

Further held, that where the assessee had incurred a loss of Rs. 66,698 due to fluctuation in the exchange rate. This loss occurred in the repayment of loan on account of change in the exchange rate. Loan was raised in foreign currency for the purchase of a machine from Germany. The Assessing Officer took the view that loss was referable to the capital asset and was, therefore, not admissible as the revenue expenditure but was in the nature of capital expenditure. If such increase is between the dates of the agreement and the acquisition of asset, the case is covered under Section 43(1) of the Act and the escalation in price would go to increase the actual cost. The assessee had to pay extra amount towards the cost of the machine on account of fluctuation in the exchange rate. The cost of the machine increased due to change in exchange rate only. Therefore, the question is answered in the affirmative i.e. in favour of the revenue and against the assessee.

(Paras 15, 19, 22 and 24)

R.P. Sawhney, Senior Advocate with S.K. Sharma, Advocate, *for the petitioner*

M.S. Jain, Senior, Advocate with Adarsh Jain, Advocate and S.K. Harish, Advocate, *for the respondent.*

JUDGMENT

N.K. Agrawal, J.

(1) The following question of law have been referred by the Income Tax Appellate Tribunal (for short, "the Tribunal") under Section 256(1) of the Income Tax Act, 1961 (for short "the Act"):—

(i) AT THE INSTANCE OF THE DEPARTMENT

"Whether the Tribunal was right in holding that for working out the amount to be disallowed under section 40A (5) the amount taxed in the hands of the employees on account of the perquisite should be considered instead of the amount of

actual expenditure incurred by the assessee for providing car to the employee's?"

(ii) AT THE INSTANCE OF THE ASSESSEE :—

1. Whether the Tribunal was right in law in holding that the Income-tax Officer had no option but to compute and allow the depreciation to the asessee in this year ?
2. Whether on the facts and in the circumstances of the case the Tribunal mis-directed itself in considering Rs. 5400 as a perquisite value for the car used by the executives of the company under section 40A (5)?
3. Whether on the facts and in the circumstances of the case, the loss of Rs. 66,698 due to fluctuation in foreign exchange rate at the time of repayment of foreign currency loan should be treated as capital expenditure?"

(2) The assessee company was engaged in the business of the manufacture and sale of machine tools at its head office at Ballabgarh and was running Rolling Mill Foundary unit and machine tools unit at its branch at Batala, Return for the assessment year 1977-78 (accoounting year ending on December 31, 1976) was filed showing net income at nil. The questions of law shall be examined as under:—

QUESTION IN THE DEPARTMENT'S REFERENCE AND QUESTION NO. 2 IN ASSESSEE'S REFERENCE:

(3) The assessee Company paid salary and provided perquisites to some employees. The Assessing Officer was of the view that total perquisites were in excess of the limit prescribed in sub-section (5) of Section 40A of the Act. The assessee had computed the value of car facility provided to two employees which, however, was not accepted to be corrected by the Assessing Officer.

(4) The Assessing Officer looked into the actual expenditure incurred on the facility of car provided to the employees, V.K. Anand and T.S. Dhingra. Expenditure on car provided to V.K. Anand for personal use was Rs. 31,135 and that on the car provided to T.S. Dhingra for four months (on proportionate basis) was Rs. 9,249. The Assessing Officer took into account, besides the value of car facility, the perquisites like rent-free accommodation, salaries paid

to personal servants, medical expenses, club membership fee, etc., in respect of each such employee and restricted the perquisites to 1/5th of the salary in case of each employee.

(5) The value of the perquisites is not to exceed 1/5th of the salary paid to an employee under Section 40A(5) of the Act. It was for that reason that the Assessing Officer disallowed the expenditure incurred by the assessee-Company in providing facilities and perquisites to the employees in excess of 1/5th of the salary.

(6) In appeal filed by the assessee against the disallowance, the Commissioner of Income-tax up-held the order of the Assessing Officer. In further appeal, the Tribunal took the view that the perquisite value of the two cars provided for personal use to the Directors, V.K. Anand and T.K. Dhingra, should be restricted to that amount which was actually assessed in the hands of those employees. The Tribunal also held that the reimbursement of medical expenditure was not a perquisite.

(7) Expenditure on the provision of a car to an employee is includible in the value of perquisities for the purposes of Section 40A(5) of the Act. Value of all perquisities including the facility of car provided to an employee is not to exceed 1/5th of the salary paid to him as laid down in Section 40A (5) of the Act. The aggregate value of all the perquisites is liable to be disallowed to the extent it exceeded the amount equivalent to 1/5th of the salary. The amount of medical reimbursement is, however, not includible in the perquisites.

(8) A Division Bench of this Court had an occasion to examine a question relating to the free use of car provided by the assessee Company to its employees in *'Commissioner of Income-tax* v. *Nuchem Plastics Ltd.*(1). The question there had arisen as to whether the value of the perquisite relating to the use of car was to be calculated with reference to Rule 3 of the Income Tax Rules, 1962. The Court held that there could not be two different standards for assessment in respect of the employee and employer and value must be calculated with reference to Rule 3.

(9) The controversy in the present case actually arose from the restriction applied by the Income-tax Officer to the allowability

1. 179 I.T.R. 196

of deducation in respect of the value of perquisites. He allowed deduction to the extent of 1/5th of the total salary paid to the employee. In the cases of the two employees, namely, V.K. Anand and T.S. Dhingra, the Assessing Officer, after calculating the salary, computed the value of the perquisites and restricted the value to 1/5th of the salary as under:—

"1. SHRI V.K. ANAND	Rupees	
A. Salary	45,871	
Leave encashment	583	
Bonus	360	
	46,814	
Less: Allowable under the Act	46,814	
B. PERQUISITES		
(a) Rent free accommodation provided by the Co.	13,500	
(b) Personal servants salaries	2,400	
(c) Medical expenses reimbursed	3,379	
(d) Car for personal use as discussed above	31,135	
(e) Club membership fee paid by the assessee Co.	500	
	50,914	
Less: Allowable under the Act (1/5th of salary)	9,363	41,551
Disallowed	41,551	
2. SHRI T.S. DHINGRA		
(A)(i) Salary	15,467	
(ii) Leave Encashment	12,717	
(iii) Notice pay	10,500	
(iv) Gratuity	21,000	
	59684	
Less: Allowable under the Act	59684	

(B)PERQUISITES			
(a) Rent paid by the Co.		4,000	
(b) Servant allowance		887	
(c) Medical exp. reimbursed		769	
(d) Car for personal use as discussed above (proportionate exp. for 4 months)		9,249	
(e) Rotary club membership fee paid by the asessee Co.		240	
(f) Premium on fire policy for Co.'s furniture at GM's residence		160	
		15305	
LESS : Allowable under the Act.		4,000	11,305
(@ 1,000 p.m. for 4 months)			
Disallowed		11,305"	

(10) It would, thus, appear that the Assessing Officer did not make any specific disallowance in respect of the value of perquisites relating to the personal use of the car by the employees. The disallowance was made under Section 40A(5) of the Act of the value of the perquisites exceeding 1/5th of the salary. In this situation, there was no calculation of the perquisite value of the car under Rule 3 of the Income Tax Rules.

(11) Looking to the disallowance made by the Assessing Officer, the controversy projected in the questions referred for opinion does not appear to be the real controversy. It is not the application of Rule 3 of the Income Tax Rules which needs to be examined but it is the disallowance of the value of perquisites in excess of 1/5th of the salary.

(12) The question which actually arises from the controversy is whether the Assessing Officer was right in disallowing deduction of the value of perquisites in excess of the 1/5th of the salary paid to the employees. The answer to the question is in the affirmative i.e. in favour of the revenue and against the asessee.

QUESTION NO. 1 IN ASESSEE'S REFERENCE:

(13) The controversy projected through the question whether

the Assessing Officer has to allow depreciation to an assessee without there being a claim in this behalf has been examined by a Division Bench of this Court in *Beco Engineering Co. Ltd.* v. *Commissioner of Income-tax, Rohtak* (2). In that case, the assessee had filed a revised return in which he did not claim depreciation etc., which had been claimed in the original return. It was held that since the assessee did not claim any depreciation or extra shift allowance in the revised return, the Income-tax Officer was right in not computing and allowing depreciation and extra shift allowance. A question about depreciation was examined again by this Court in *'Commissioner of Income-tax* v. *Friends Corporations* (3). Following the view taken in *Beco Engineering Co. Ltd.* (Supra). It was held that the Income-tax Officer was not competent to allow depreciation suo-motu against the wishes of the assessee.

(14) Following the view taken by this Court, question raised in the present reference is answered to the effect that in case depreciation was not sought and claimed by the assessee, the Assessing Officer was not required to allow depreciation.

QUESTION NO. 3 IN ASSESSEE'S REFERENCE :

(15) The assessee had incurred a loss of Rs. 66,698 due to fluctuation in the exchange rate. This loss occurred in the repayment of loan on account of change in the exchange rate. Loan was raised in foreign currency for the purchase of a machine from Germany. The Assessing Officer took the view that loss was referable to the capital asset and was, therefore, not admissible as the revenue expenditure but was in the nature of capital expenditure.

(16) The assessee had purchased the machine outside India by securing a loan from IFCI. Loan was repayable in half yearly equal instalments in West German D.M. at the rate of 25,000 D.M. The rupee value of the repayment was debited to the machinery account in the initial year. The assessee paid two instalments of 25,000 D.M. each during the accounting year relevant to the assessment year under reference. The rupee equivalent of these instalments exceeded the amount as per the original exhange rate. The assessee had also purchased a machine on direct deferred payment basis. The rupee equivalent of the instalments paid for

2. 148 I.T.R. 478
3. 180 I.T.R. 334

that machine also exceeded the original price by a an amount of Rs. 4,308. Total amount of loss due to fluctuation in the exchange rate was, thus, Rs. 66,698.

(17) The Tribunal up-held the view that the loss occurring due to fluctuation in the exchange rate was not revenue expenditure. The Assessing Officer was, however, directed to verify the arithmetical correctness of the amount paid by the assessee and to allow depreciation on that amount.

(18) The Madras High Court in *'Commissioner of Income-tax* v. *South India Viscose Ltd.* (4), examined a question whether the expenditure incurred on the higher payment of instalment due to change in the exchange rate was capital or business expenditure. The question was answered against the assessee with the observation that it was not allowable as business expenditure inasmuch as the payment related only to the purchase price of the machinery.

(19) In *'Commissioner of Income-tax* v. *Elgi Rubber Products Ltd.* (5), the Madras High Court again took the same view and held that devaluation of currency had a far-reaching effect on the price of machinery, etc., purchased from foreign country. It often increased the original agreed price. If such increase is between the dates of the agreement and the acquisition of asset, the case is covered under Section 43(1) of the Act and the escalation in price would go to increase the actual cost.

(20) The Gujarat High Court in *'Commissioner of Income-tax* v. *Rohit Mills Ltd.* (6), has also taken the view that additional payment made in rupees on account of difference in the exchange rate becomes part of the cost of acquisition of the asset acquired by the assessee and was not a revenue expenditure.

(21) The Karnataka High Court has also taken similar view in *"Commissioner of Income-tax* v. *Motor Industries Co. Ltd.* (7) and *'Hindustan Machine Tools Ltd.* v. *Commissioner of Income - tax* (8) .

(22) The facts in the present case before us make it clear that the assessee had to pay extra amount towards the cost of the

4. 120 I.T.R. 451
5. 219 I.T.R. 109
6. 219 I.T.R. 228
7. 173 I.T.R. 374
8. 175 I.T.R. 220

machine on account of fluctuation in the exchange rate. The cost of the machine increased due to change in exchange rate only.

(23) This view finds support from the view taken by the other High Courts as discussed above.

(24) Question No. 3 in assessee's reference is answered in the affirmative i.e. in favour of the revenue and against the assessee.

R.N.R.

Before H.S. Brar, K.S. Kumaran & Swatanter Kumar, JJ

RADHEY SHYAM & ANOTHER.—*Petitioners*

versus

STATE OF HARYANA & ANOTHER.—*Respondents*

CWP No. 94 of 1993

24th November, 1997

Industrial Disputes Act, 1947—Ss.2-A, 10, 11-A and 12(5)—Reference of industrial disputes—Power of appropriate Government to make or decline reference is administrative in nature—Appropriate Government cannot usurp judicial function—only patently frivolous or clearly belated claims can be declined by the appropriate Government in exercise of its discretionary power—S. 11-A does not take away power of appropriate Government to refer or not to refer an industrial dispute for adjudication—Scope of reference, delineated.

(Ramphal v. State of Haryana, 1995 (1) RSJ 826 (D.B.), overruled)

Held that, (1) the appropriate Government can go into the merits of the dispute *prima facie* for the purpose of finding out whether an industrial dispute exists or is apprehended and whether the Government should make a reference or not.

(2) But in doing so, the appropriate Government cannot delve into the merits of the dispute and take upon itself the determination of the lis.

(3) If the claim is patently frivolous and vexatious then the appropriate Government may refuse to make the reference.

(4) In deciding whether to make a reference or not, the Government may take into consideration whether the impact of