unconditionally submitted to the jurisdiction of the arbitrator. In that view of the matter, they could certainly rake up the plea before the Court that to that extent the arbitrator had no jurisdiction to go into the said controversy. The order passed by the learned Subordinate Judge, therefore, requires no interference.

(10) For these reasons, the appeal being without merit must fail and is dismissed.

S.C.K.

Before G. C. Garg & N.K. Agrawal, JJ

M/S KANSAL WOOLEN & HOSIERY MILLS,—*Appellant*

versus

THE COMMISSIONER OF INCOME TAX, PATIALA,—*Respondent*

ITR Nos. 79 & 80 of 1990

15th January, 1999

Income Tax Act, 1961—S. 35—B—Income Tax Rules, 1962—Rl. 6AA-S.35-B amended, sub-clauses (ii), (iii), (v), (vi) and (viii) of clause (b) deleted w.e.f. 1st April, 1981-Assessee claiming deduction for samples not despatched to outside India-Samples lying in stock with the assessee-Assessee claming deductions for expenditure incurred on advertisement, free sample, quality control and export promotion-Grant of such deductions.

Held, that the deduction claimed by the assessee related to the value of the closing stock of the samples. There is nothing on record to show that the deduction had been disallowed in respect of the samples furnished to a buyer outside India. The assessee had divided the samples into three categories. One set of samples was kept at the Delhi office of the buyers, another set of samples was sent to Russia and the third set of samples was kept at the manufacturing unit of the assessee. The Assessing Officer had disallowed deduction in respect of the third set of samples which was retained by the assessee at his manufacturing unit and was shown in the closing stock. The third set of samples was not furnished to the foreign buyers. Sub clause (i) of clause (b) of Section 35B (1) was, thus, not attracted, because it was not a case of sending of samples by way of advertisement or publicity outside India.

(Paras 14)

Further held, that the accounting year of the assessee ended on 31st August, 1981. Rule 6AA was inserted in the Rules w.e.f. 1st August, 1981. Thus, the said rule was not available to the assessee for the claim of any deduction thereunder. Moreover, the claim in respect of sample designing does not fall under any of the clauses of Rule 6AA.

(Para No. 17)

Further held, that the expenditure on advertisement is covered under sub clause (i) of clause (b) if the advertisement or publicity is made outside India in respect of the goods exported by the assessee. Expenditure on samples furnished to buyer outside India attracts sub-clause (vi) of clause (b). The other expenditures, namely, expenditures on quality control, subscription, export promotion, MFHC commission and WEEP commision do not qualify for deduction as these expenditures do not fall under any of the sub clauses of clause (b) of Section 35B (1) of the Act.

(Para 19)

P.C. Jain, Advocate with Pankaj Jain, Advocate *for the Petitioner*

R.P. Sawhney, Senior Advocate with Rajesh Bindal, Advocate *for the Respondent.*

JUDGMENT

N.K. AGRAWAL, J.

(1) These are two references made by the Income-tax Appellate Tribunal, Chandigarh Bench (the 'Tribunal') under section 256(1) of the Income-tax Act, 1961 (for short, the Act), one at the instance of the assessee and the other on the request of the Revenue, seeking opinion, of this Court on the following questions of law for the assessment year 1981-82 :—

(a) Questions at the instance of the assessee :

"1. Whether on the facts and in the circumstances of the case, the Appellate Tribunal is right in law in holding that expenses of Rs. 1,43,837 incurred on Sample Designing' in the context of the assessee's Export Business, are manufacturing expenses within the meaning of the Explanation 2 to Section 35-B(1) (b) of the Income Tax Act, 1961 ?

2. Whether, on the facts and the circumstances of the case, the Explanation 2 has been properly interpreted/construed by

the Appellate Tribunal in withholding legitimate weighted deduction under Section 35B(1) (b) (i) on Sample Designing, which are otherwise been allowed as a business expense in computing the total income of the assessee-company by the Assessing Authority ?"

(b) Questions at the instance of the Revenue :

"1. Whether on the facts and in the circumstances of the case, the Appellate Tribunal was right in law in allowing weighted deduction u/s 35 B in respect of the expenses incurred by the assessee on Quality Control, Advertisement, Subscription, Free Samples, Export Promotion, MFHC commission and WEEP commission under sub-clause (ix) of clause (b) of sub-section. (1) of section 35B added by the Finance Act, 1980 w.e.f. 1st April, 1981 read with rule 6AA inserted by the Income-tax (8th Amendment) Rules, 1981 w.e.f. 1st August, 1981 ?

2. Whether on the facts and in the circumstances of the case, the Appellate Tribunal was right in law in allowing depreciation on Generator @ 30% instead of 10% as allowed by the ITO ?"

(2) The assessee was a public limited company and was engaged in the business of hosiery goods. The assessee was exporting goods to Russia besides making sales within India. The assessee claimed deduction under Section 35B of the Act at Rs. 1,83,839. The deduction was claimed in respect of the expenditures on sample designing, quality control, inspection, advertisement, foreign tours etc. Keeping in view the amendment made in section 35B by Finance (No. 2) Act, 1980 w.e.f. 1st April, 1981, the Assessing Officer allowed deduction only in respect of the expenditure on foreign tours amounting to Rs. 1,45,725. Thus, the Assessing Officer allowed relief at Rs. 48,575 against the assessee's claim at Rs. 1,83,839.

(3) The assessee went in appeal before the Commissioner of Income-tax (Appeals) with the plea that the Assessing Officer had ignored to consider the claim for a deduction under sub-clause (ix) of clause (b) of section 35B (1) read with Rule 6AA of the income-tax Rules, 1962 (for short, the Rules'). The Commissioner agreed with the assessee and allowed deduction in respect of the expenditure on quality control, advertisement, export promotion, subscription for foreign trade periodicals and journals and free samples. The Commissioner further allowed part relief in respect of samples in the closing stock. The assessee had not declared the value of samples left in the closing stock at the

end of the accounting year. The Assessing Officer had made addition of Rs. 41,692 in respect of 1/3rd stock of the samples manufactured by the assessee during the year and left in the closing stock. On a specific plea reaised about the rate, the Commissioner granted the relief at Rs. 8,797 after adopting the rate at Rs. 110.93 per Kg. in place of the rate adopted by the Assessing Officer at Rs. 140 per Kg. Thus, addition was reduced from Rs. 41,692 to Rs. 32,955.

(4) Both the assessee and the Revenue filed appeals before the Tribunal which deleted the entire addition made on account of the valuation of the samples in the closing stock. The Tribunal agreed with the assessee's plea that three sets of samples were manufactured for showing them to the foreign buyers. One sample was kept at the buyers office at Delhi, one was sent to Russia and the third sample was retained to manufacture the goods on the basis of that sample. The Department challenged the order of the Commissioner whereby deductions under section 35B were allowed in respect of the expenditures on quality control, advertisement, subscription, free samples and export promotion etc. The plea taken was that the Commissioner had wrongly allowed deduction under Rule 6AA of the Rules. Expenditures had been incurred during the accounting year ending on 31st March, 1981 and therefore, the same did not qualify for deduction under the said Rule, which was introduced w.e.f. 1st August, 1981. The Tribunal, however, took the view that the assessment year under appeal was 1981-82 which commenced from 1st April, 1981. Since the new Rule 6AA had come into force from August, 1981, it covered the entire assessment year 1981-82 as the assessment was pending on 1st August, 1981 at the appellate stage. The Department's plea was, therefore, rejected by the Tribunal and the deduction allowed by the Commissioner on various expenditures under sub-clause (ix) of clause (b) of section 35B (1) read with Rule 6AA was upheld. The Tribunal, in assessee's appeal, also allowed deduction under section 35B in respect of the expenditures incurred on samples and also on the amount of commission paid.

(5) The two questions, as reproduced above, referred to this court at the instance of the assessee relate to the expenditure by the assessee on sample designing.

(6) Section 35B of the Act permits the benefit of export markets development allowance to a company on certain specfied expenditures incurred on the distribution, supply or provision outside India of the goods, services or facilities. Clause (b) of sub-section (1) of section 35B specifies the expenditures, which would qualify for this weighted deduction, incurred by the tax-payer during the previous year wholly

and exclusively on the activities mentioned in sub-clauses (i) to (ix). The expenditures which qualify for such deduction are those incurred on the activities exercised outside India for the development of export markets for Indian goods. This provision was not meant to cover the expenditures which the tax-payer incurred on the activities inside India for the export business except where those were incidental to the activities outside India, such as the preparation and submission of tenders referred to in sub-clause (v) or the furnishing of samples or technical information referred to in sub-clause (vi) of clause (b). Under sub-clause (ix) of clause (b), it was open to the Government to notify in the Income-tax Rules any other activites for the promotion of sale outside India. On such notification, expenditures on such activities will also qualify for the weighted deduction. Thus, it is clear that deduction under Section 35B is admissible with reference to the qualifying expenditures only.

(7) Sub-clause (vi) of clause (b) of section 35B(1) relates to expenditures incurred on samples or technical information which reads as under :—

> "(vi) furnishing to a person outside India samples or technical information for the promotion of the sale of such goods, services or facilities ;"

(8) Under the above sub-clause, expenditures incurred by the assessee on the furnishing of samples or technical information for the promotion of sale to a person outside India are eligible for deduction. The assessee had claimed deduction in respect of the samples left in the closing stock at the end of the accounting year. It is, thus, apparent that the samples in respect of which deduction was claimed under section 35B were not the samples furnished to a person outside India. The Assessing Officer had declined to allow deduction of the value of the samples lying in the closing stock. The Commissioner allowed part relief to the assessee by adopting a lower rate for the purpose of valuation. The Tribunal, however, allowed the entire claim of the assessee in respect of closing stock of the samples. Since the assessee had claimed deduction in respect of closing stock of the samples, sub-clause (vi) of clause (b) is not attracted.

(9) It is further to be noticed that sub-clauses (ii), (iii), (v), (vi) and (viii) of clause (b) of section 35B(1) of the Act were omitted by the Finance (No. 2) Act, 1980 w.e.f. 1st April, 1981. In the Notes on clauses appended to the Finance (No. 2) Act [reproduced in 123 ITR (Statutes) 122] it has been stated in respect of the aforesaid amended, whereby

five sub-clauses of clause (b) of section 35B(1) were omitted, as under :—

> "These amendments will take effect from 1st of April, 1981, and will accordingly apply in relation to the assessment year 1981-82 and subsequent years."

(10) Since the assessee claimed deduction in respect of sample designing for the assessment year 1981-82, benefit under sub-clause (vi) of clause (b) of section 35B(1) could not be made available to him inasmuch as the said sub-clause had been omitted from the assessment year 1981-82.

(11) The claim made by the assessee in respect of sample designing is also not admissible in view of the following Explanation 2, which was inserted below sub-clause (b) of section 35B (1) by Finance(No.2) Act, 1980 w.e.f. 1st April, 1981 :—

> "**Explanation 2** : For removal of doubts, it is hereby declared that nothing in clause (b) shall be construed to include any expenditure which is in the nature of purchasing and manufacturing expenses ordinarily debitable to the trading or manufacturing account and not to the profit and loss account."

(12) Under the above Explanation, expenditures in the nature of purchasing and manufacturing expenses which are ordinarily debitable to the trading or manufacturing account are not eligible for deduction under clause (b) of section 35B(1) of the Act. The assessee had claimed deduction of the cost of the sample designing. There is nothing on record to show as to why the cost of manufacturing the samples was not debitable to the manufacturing account. In the light of the above Explanation, the cost of the sample designing would not qualify for deduction.

(13) Learned counsel for the assessee has argued that sub-clause (i) of clause (b) of section 35B (1) permitted deduction in respect of advertisement or publicity outside India. Since the sample had been manufactured for the purpose of advertisement outside India, deduction was allowable under sub-clause(i). Reliance has been placed on a decision of the Karnataka High Court in *Gokuldass Exports* vs. *Commissioner of Income-tax (1),* wherein it was held that if the purpose of advertisement could be achieved by sending sample abroad, there was absolutely no reason why such an act of sending samples should be confined to sub-clause (vi) alone.

(1) (1993) 200 ITR 401.

(14) The deduction claimed by the assessee related to the value of the closing stock of the samples. There is nothing on record to show that the deduction had been disallowed in respect of the samples furnished to a buyer outside India. The assessee had divided the samples into three categories. One set of samples was kept at the Delhi office of the buyers, another set of samples was sent to Russia and the third set of samples was kept at the manufacturing unit of the assessee. The Assessing Officer had disalllowed deduction in respect of the third set of samples which was retained by the assessee at his manufacturing unit and was shown in the closing stock. The third set of samples was not furnished to the foreign buyers. Sub-clause (i) of clause (b) of section 35B (1) was, thus, not attracted, because it was not a case of sending of samples by way of advertisement or publicity outside India.

(15) Learned counsel for the assessee has also placed reliance on a decision of the Madras High Court in *Lucas TVS Ltd.* vs. *Commissioner of Income-tax, (2).* After considering Rule 6AA of the Rules, it was held that the said Rule was a clarificatory rule in respect of the pre-investment surveys, preparation of feasibility studies or project reports. Clause (a) of Rule 6AA was examined in the light of sub-clause (vi) of clause (b) of section 35B (1) and it was held that clause (a) of Rule 6AA being declaratory in nature was retrospective in its operation. With respect, we are unable to take the same view. As has been noticed earlier, sub-clause (vi) of clause (b) of section 35B(1) was omitted w.e.f. 1st April, 1981 whereas Rule 6AA was inserted in the Rules by the Income-tax (Eighth Amendment) Rules, 1981, w.e.f. 1st August 1981. Thus, Rule 6AA came into force much after the omision of sub-clause (vi) of clause (b) of section 35B(1) of the Act. Rule 6AA was, therefore, not in the nature of a declaratory or clarificatory rule so far as the omitted sub-clause (vi) of clause (b) of section 35B(1) was concerned. Since sub-clause (vi) of clause (b) had been omitted earlier, Rule 6AA could not be treated to be in the nature of a clarificatory rule for a substantive provision of the Act, which was no more on the statute book. Further, Rule 6AA was framed under sub-clause (ix) of clause (b) of section 35B(1). The said sub-clause reads as under :—

> "(ix) such other activities for the promotion of the sale outside India of such goods, services or facilities as may be prescribed."

(16) It would, thus, appear that under sub-clause (ix), the Government had been empowered to specify other activities for the promotion of sale outside India for the purposes of weighted deduction. Thus, sub-clause (ix) of clause (b) was in the nature of a residuary provision for the purpose of adding more activities to those already

(2) (1996) 217 ITR 382.

specified in sub-clauses (i) to (viii). The Government had the authority to specify more activities for the purpose of deduction under section 35B of the Act. Thus, Rule 6AA, framed under sub-clause (ix) of clause (b) of section 35B(1), was not in the nature of a clarificatory rule but was a distinct and independent provision specifying more qualifying activities for the purposes of weighted deduction.

(17) The accounting year of the assessee ended on 31st March, 1981. Rule 6AA was inserted in the Rules w.e.f. 1st August, 1981. Thus, the said Rule was not available to the assessee for the claim of any deduction thereunder. Moreover, the claim in respect of sample designing does not fall under any of the clauses of Rule 6AA. Under clause (a) of the said Rule expenditures incurred on pre-investment surveys or the preparation of feasibility studies or project reports are eligible for deduction. Further, expenditures incurred on the maintenance of a warehouse outside India and also expenditures incurred on the maintenance of a laboratory or other facilities for quality control or insepection of the goods have also been declared as eligible for weighted deduction under clauses (b) and (c). Purchase of foreign trade periodicals or journals relating to the business of the assessee qualifies for deduction under clause (d) of the rule. Thus, expenditure on sample designing does not fall under Rule 6AA of the Rules.

(18) In view of the above discussion, questions No. (1) and (2), referred to this Court at the instance of the assessee, are answered to the effect that the manufacturing expenditure or the cost of samples was not eligible for deduction under section 35B of the Act.

(19) The questions referred to this Court for opinion at the instance of the Revenue relate to the deduction of expenditures incurred by the assessee on quality control, advertisement, subscription, free samples, export promotion, MFHC commission and WEEP commission under sub-clause (ix) of clause (b) of section 35B(1) of the Act. Expenditure on advertisement is covered under sub-clause (i) of clause (b) if the advertisement or publicity is made outside India in respect of the goods exported by the assessee. Expenditure on samples furnished to a buyer outside India attracts sub-clause (vi) of clause (b). The other expenditures, namely, expenditures on quality control, subscription, export promotion, MFHC commission and WEEP commission do not quality for deduction as these expenditures do not fall under any of the sub-clauses of clause (b) of section 35B(1) of the Act.

(20) The Supreme court in *Commissioner of Income-Tax* v. *Stepwell Industries Ltd. and others,* (3), has held that deduction under

(3) 228 ITR.171.

section 35B is not admissible in respect of commission paid or other expenditures incurred by the assessee unless any of the sub-clauses of clause (b) of Section 35B(1) is attracted.

(21) Learned counsel for the assessee has argued that the expenditure on quality control is covered under clause (c) of Rule 6AA of the Rules and expenditure on the purchase of foreign trade periodicals and journals qualified for deduction under clause (d) of the aforesaid Rule. Clause (c) of Rule 6AA refers to the expenditure on the maintenance of a laboratory or other facilities for quality control or inspection of goods exported by the assessee. Such expenditures usually qualify for deduction in proportion to the exports in relation to the total sales made by the assessee. Under clause (d) of Rule 6AA, deduction of expenditure on the purchase of foreign trade periodicals or journals relating to the business of the assessee is admissible.

(22) As has been seen ealrlier, Rule 6AA was inserted by the Income-tax (English Amendment) Rules, 1981 w.e.f. 1st August, 1981. The accounting year of the assessee ended on 31st March, 1981. Thus, the said Rule was not in force during the accounting period of the assessee. In this light, clauses (c) and (d) of Rule 6AA do not help the assessee as these clauses were not in force prior to 1st August, 1981 whereas expenditures had been incurred by the assessee prior to 1st April, 1981.

(23) Learned counsel for the assessee has relied upon two decisions of the Calcutta High Court. In *Commissioner of Income-Tax* v. *Moran Tea Co. (India) Ltd. (4),* it was held that Rule 6AA having come into force from 1st August, 1981 was operative during the previous year relevant to the assessment year 1982-83 and, therefore, the assessee was entitled to weighted deduction of expenditure incurred during the entire period of the relevant previous year and not merely to a *pro rata* deduction of expenditure incurred after 1st August, 1981. *In Commissioner of Income-Tax* v. *Bishnauth Tea Co. Ltd. (5),* the question relating to the retrospective effect of Rule 6AA was examined and it was held that the Rule did not have any retrospective operation in respect of the assessment year 1980-81. Thus, the aforsaid decisions of the Calcutta High Court do not help the assessee in respect of his plea that Rule 6AA, which came into force w.e.f. 1st August, 1981, would be applicable to the accounting period ending on 31st March, 1981. Expenditures on quality control and on the purchase of foreign trade periodicals and journals are not eligible for deduction inasmuch as

(4) (1992) 194 ITR 429.
(5) (1992) 197 ITR 150.

Rule 6AA of the Rules would not be available to the aid of the assessee. Expenditures on advertisement and samples would also not be eligible under sub-clause (ix) of clause (b) of section 35B(1) of the Act. It is not clear as to under what circumstances deduction of expenditures on advertisement and free samples was claimed and considered under sub-clause (ix) of clause (b) and not under sub-clauses (i) and (vi) of clause (b) of section 35B(1) of the Act. Be that as it may, expenditures on advertisement and samples do not quality for deduction under sub-clause (ix) of clause (b) of section 35B(1) of the Act.

(24) Expenditures on export promotion and commission do not qualify for deduction under any of the sub-clauses of clause (b) of Section 35B(1) of the Act.

(25) Question No. 1 at the instance of the Revenue is, therefore, answered in the negative, i.e., in favour of the Revenue and against the assessee.

(26) Question No. 2 at the instance of the Revenue relates to the depreciation on Generator.

(27) In Appendix I under Rule 5 of the Rules, rates have been specified at which depreciation is admissible on various assets. In Part I, under the head, "III. Machinery and Plant (not being a ship)", entry (xiii) under "D(10A)—Renewable energy devices" reads as under :—

> "(xiii) Any special devices including electric generators and pumps running on wind energy."

(28) The reat of depreciation at 30% has been specified for an electric generator or pump running on wind energy.

(29) The Tribunal has allowed depreciation at 30% on the generator without ascertaining whether it was run on wind energy. Entry (xiii) lies under the head "D(10A)- Renewable energy devices". It, therefore, leaves no room for any doubt that the special devices including electric generators and pumps mentioned in entry (xiii) are in the nature of renewable energy devices. An electric generator run on wind energy would alone fall under Entry (xiii) and not other generators. The Tribunal would, therefore, be well advised to verify whether the generator, on which the assessee claimed depreciation at 30% was run on wind energy.

(30) Question No. 2, referred to this Court for opinion at the instance of the Revenue, is therefore, returned unanswered with a direction to the Tribunal to verify whether the generator of the assessee was run on wind energy. If that was so, depreciation at 30% would be admissible ; otherwise not.

(31) The two reference petitioners stand disposed of.

S.C.K.

Before Jawahar Lal Gupta and N.C. Khichi, JJ.

STATE OF PUNJAB AND OTHERS,—*Appellants*

versus

M/S PUNJAB FIBRES LTD. AND OTHERS,—*Respondents*

L.P.A. No. 1179 of 1992

31st August, 1998

Punjab General Sales Tax Act, 1948—S. 21(1)—Industries (Development and Regulation) Act, 1951—S.2, Schedule I, Entry 23—Notification, dated 23rd November, 1979—Tax rebate granted on purchase of cotton by textile Mills established on or after 1st December, 1979—"Textile mills" not defined—Assessee manufacturing yarn and fibre—'Textile' whether includes only woven fabric or also spinning yarn—Interpretation—Held, 'textile' includes yarn/fibre—As to admissibility of benefit of notification to only such mills as are established on or after 1st December, 1979 on facts found that production started after 1st December, 1979—Neither incorporation of Company nor registration under Sales Tax Act would constitute establishment of a mill—The Commissioner was not justified in suo motu reopening the order of the Assessing Authority u/s 21(1)—Assessee held entitled to the concession and State appeal dismissed.

Held, that normally the expression 'textile' implies "a fabric made by weaving". However, even 'material' or fibre which is suitable for weaving is also included in the expression 'textile'. Thus, it cannot be said that the first respondent is not running a textile mill merely because it is not producing a woven fabric. Indisputably, the respondent is spinning the yarn. It is producing fibre which is "a material suitable for weaving". Thus, it cannot be said that the respondent has not established a textile mill.

(Para 11)