

THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 20.10.2008

+ ITA 337/2007, 1127/06, 1054/06 & 289/2007

**THE COMMISSIONER OF INCOME
TAX DELHI-X**

... Appellant

- versus -

M/S AHUJA RADIOS

... Respondent

Advocates who appeared in this case:

For the Appellant : Mrs Prem Lata Bansal.

For the Respondent : Mr B.B. Ahuja Sr Advocate with
Mr D.K. Verma and Mr H.K. Sud.

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE RAJIV SHAKDHER

1. Whether Reporters of local papers may be allowed to see the judgment ? YES
2. To be referred to the Reporter or not ? YES
3. Whether the judgment should be reported in Digest ? YES

BADAR DURREZ AHMED, J

1. These appeals under Section 260A of the Income Tax Act, 1961 (hereinafter referred to as the "said Act") pertain to the same assessee but to different assessment years. ITA 337/2002 relates to assessment year 1993-94, ITA 1127/06 relates to assessment year 1997-98, ITA 1054/06 relates to assessment year 1998-99 and ITA

289/2007 relates to the assessment year 2000-01. In all these appeals the following substantial question of law has been framed for determination:-

“Whether the Tribunal was correct in law in holding that MODVAT credit has not to be included in the total turnover for the purposes of computing the eligible deduction under Section 80HHC of the Income-tax Act, 1961?”

2. It is not necessary for us to set out the facts in respect of each of the assessment years. It is sufficient to note that the assessee claimed deduction under Section 80HHC of the said Act. The claim of deduction by the assessee was based on a computation of total turnover which did not include the amount of modvat credit which was availed by the assessee in respect of excise duty paid on raw materials and inputs and adjusted against the excise duty payable by the assessee in respect of its finished products. The assessee is involved in the manufacture and sale of public address equipments such as amplifiers, microphones and loud speakers. The Assessing Officer was of the view that in computing total turnover for the purposes of arriving at the deduction allowable under Section 80HHC the modvat credit availed by the assessee had to be included. The Assessing Officer was of the view that it should be so included because it formed part of the cost of the final product.

3. The Tribunal, in respect of each of the assessment years in question, has followed its orders in respect of the assessee's own case for assessment year 1990-91 and 1991-92 and has agreed with the assessee that modvat credit is not to be included in computing "total turnover" for the purposes of claiming deduction under Section 80HHC.

4. According to the learned counsel for the revenue/appellant, the Tribunal erred in law in holding that the modvat credit was to be excluded from the total turnover for the purposes of computing the deduction under Section 80HHC. The learned counsel for the revenue submitted that the definition of total turnover given in Explanation (ba) at the end of Section 80HHC had not excluded modvat credit from total turnover whereas it had specifically excluded freight and insurance attributable to the transfer of goods from the customs stations. Mrs Bansal, appearing on behalf of the revenue, submitted that only the specific items of freight and insurance as indicated in the said Explanation (ba) could be excluded from total turnover. Since modvat credit was not specifically mentioned as an excluded item, it had to be included in total turnover for the purposes of Section 80HHC. The learned counsel for the Assessee submitted to the contrary.

5. We may note that when these appeals were admitted and the question noted above had been framed, the decision of the Supreme Court in the case of **Commissioner of Income-Tax v Lakshmi Machine Works: [2007] 290 ITR 667 (SC)** had not been rendered. Prior to the said decision of the Supreme Court, there were decisions of several High Courts including the decision of the Bombay High Court in **CIT v Sudershan Chemicals (Pvt) Ltd.: 245 ITR 765**, wherein it had been held that excise duty and sales tax were not to be included in “total turnover” for the purposes of Section 80HHC. However, it was the Supreme Court decision in *Lakshmi Machine Works (supra)*, which set the issue at rest. The Supreme Court observed that “just as interest, commission etc. did not emanate from “turnover”, so also excise duty and sales tax do not emanate from such turnover.” The Supreme Court held that “since excise duty and sales tax did not involve any such turnover such taxes had to be excluded.” The Supreme Court arrived at the above conclusion because, in their view, sales tax and excise duty did not have any element of “turnover”. This view in *Lakshmi Machine Works (supra)* has been further reinforced by a subsequent decision of the Supreme Court in the case of **The Commissioner of Income Tax. v. Cetapharma (India) Private Limited: 292 ITR 641.**

6. At this juncture, it would be relevant to note that in ***Lakshmi Machine Works (supra)***, it had been urged on behalf of the revenue that while construing a taxing statute a strict interpretation should be given by the Courts. It was contended that the definition of the words “total turnover” did not include freight/insurance. On this basis, it was urged that since the legislature had not intended to include freight or insurance it had specifically mentioned so in Explanation (ba) to Section 80HHC. It was contended that since only insurance and freight were to be excluded, it was not open to the Courts to exclude excise duty and sales tax from the concept of “total turnover” in the formula to be implied under Section 80HHC. This argument was rejected by the Supreme Court in ***Lakshmi Machine Works (supra)***. The position is, therefore, clear. Excise duty is not to be included in computing “total turnover” for the purposes of arriving at the deduction which an assessee can claim under Section 80HHC.

6. In the present case, the question relates to the inclusion or exclusion of modvat credit. In ***Ichalkaranji Machine Centre Pvt. Ltd. v. Collector of Central Excise, Pune: 2004 (174) ELT 417 (SC)*** the Supreme Court indicated the nature of modvat as under:-

“Modvat is basically a duty-collecting procedure, which aims at allowing relief to a manufacturer on the duty element borne by him in respect of the inputs used by him.”

The Supreme Court also noted that “the object of the modvat scheme was to reduce cost of final product by taking credit for the duty paid on the inputs.” In **Fenner (India) Ltd. v. Deputy Commissioner of Income Tax: 241 ITR 672**, a learned single Judge of the Madras High Court noted that one of the modes of payment of excise duty is by way of adjustment of credit given to the manufacturer of the duty paid by it on excisable goods used as inputs, towards duty payable by the manufacturer on the finished product. The Court observed that the credit allowed is, therefore, credit which is to be utilised towards the payment of duty and that the utilisation of modvat credit results in the payment of excise duty on the final product to the extent of the credit utilised. We are in full agreement with these observations, particularly in view of the nature of the modvat scheme as explained by the Supreme Court in the case of ***Ichalkaranji Machine Centre Pvt. Ltd (supra)*** where, as noted above, the Supreme Court observed that modvat was basically a duty-collecting procedure, which aims at allowing relief to a manufacturer on the duty element borne by him in respect of the inputs used by him and for which he takes credit for the same. This credit is to be adjusted against the duty payable by him on his final products. Thus, the moment the modvat credit taken by the manufacturer is adjusted against the excise duty payable by him in respect of his final product, his liability to pay excise duty to that extent stands discharged. In **Eicher Motors Ltd v. Union of India: (1999) 2**

SCC 361 and in *CCE v. Dai Ichi Karkaria Ltd : (1999) 7 SCC 448* the Supreme Court observed that a credit under the MODVAT Scheme was “as good as tax paid.” In other words, an adjustment of modvat credit essentially entails the payment of excise duty.

7. We have already noted above that excise duty, in view of the Supreme Court decision in the case of *Lakshmi Machine Works (supra)*, is not to be included in computing “total turnover” for the purposes of Section 80HHC. Since we are of the view that the modvat credit availed and adjusted against the duty payable by the assessee, is nothing but excise duty in itself through another “duty collecting procedure”, such modvat credit cannot be included in the total turnover for the purposes of computing the eligible deduction under Section 80HHC of the said Act. Just as excise duty does not involve any element of “turnover” (as held by the Supreme Court in *Lakshmi Machine Works (supra)*), modvat credit also does not involve any such element of “turnover”.

8. Consequently, we answer the question in the following manner:-

The Tribunal was correct in law in holding that modvat credit has not to be included in the total turnover for the purposes of computing the eligible deduction under Section 80HHC of the Income Tax Act, 1961.

As a result of this, the appeals are dismissed. The parties shall bear their own costs.

BADAR DURREZ AHMED, J

RAJIV SHAKDHER, J

October 20, 2008

J