

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 17.02.2015

CORAM

**THE HONOURABLE MR. JUSTICE R.SUDHAKAR
AND
THE HONOURABLE MR. JUSTICE R.KARUPPIAH**

T.C.A. NO. 1109 OF 2007

Commissioner of Income Tax
Chennai.

.. Appellant

- Vs -

M/s. Samrat Towers
Consultants Pvt. Ltd.
No.28, Soliappa Street
Mylapore, Chennai 600 004.

.. Respondent

Appeal filed under Section 260-A of the Income Tax Act against the order dated 16.2.07 passed by the Income Tax Appellate Tribunal, 'C' Bench, Chennai, made in ITA No.2603/Mds/2004.

For Appellant : Mr. J.Narayanaswamy

For Respondent : Mr. Philip George

JUDGMENT

(DELIVERED BY R.SUDHAKAR, J.)

Aggrieved by the order passed by the Tribunal in allowing the appeal filed by the assessee, the Revenue/appellant is before this Court by filing the present appeal. This Court, vide order dated 27.08.2007, while admitting

the appeal, framed the following substantial questions of law for consideration :-

"i) Whether in the facts and circumstances of the case, the Tribunal was right in holding that the revision made by the CIT under Section 263 is bad in law?

ii) Whether in the facts and circumstances of the case, the Tribunal was right in allowing the deduction under Section 80-O in respect of tower testing activity, etc.?"

2. The respondent/assessee is a company engaged in the business of designing and transmission microwave towers used in power sectors, telecommunication and mobile phone operations. The assessee, in the course of assessment for the assessment year 2002-2003, claimed deductions under Section 80-O of the Income Tax Act in respect of tower testing activities, which the assessee characterized as 'design'. The assessment was accepted and the assessing officer allowed the said deduction on the net income. However, the said assessment was revised by the Commissioner of Income Tax under Section 263 of the Income Tax Act, as the Commissioner of Income Tax was of the view that the income, from the nature of business activities as shown by the assessee, was not eligible for deduction under Section 80-O of the Income Tax Act.

3. Aggrieved by the said order of the Commissioner of Income Tax, the assessee preferred appeal to the Tribunal. The Tribunal, following its own earlier order in the case of **Ontrack Systems Ltd. - Vs - ACIT (ITA No.442/Mds/2004)**, allowed the appeal. The Tribunal, with regard to the order under Section 263 of the Act, relying on the decision of the Supreme Court in the case of **Malabar Industrial Co. - Vs - CIT (2000 (243) ITR 83 (SC))**, allowed the appeal in favour of the assessee holding that the order passed by the Commissioner under Section 263 of the Act is bad in law. For better clarity, the relevant portion of the order of the Tribunal is extracted hereinbelow :-

"5. The only issue is whether the assessee's work pertains to use of drawing and designing or it is a related work for the construction of Microwave Towers. Even the CIT in his order in para 4.3. (i) has stated that "As per these invoices, it has drawn the design as per the requirements of the owners and handed over them for further execution" and categorically held that the assessee has drawn the design as per the requirement of the owners, but whether this will take away the requirement of Section 80-O or not. In similar facts in the case of Ontrack Systems Ltd. - Vs - ACIT, the Chennai Bench of the Tribunal, in I.T.A. No.442/Mds/2004 by order dated 13th October, 2006, in which one of us, namely, the Judicial Member is a party, while dealing the issue of drawing of website, has held as under :-

"It is seen that this development work is highly specialized work which includes state-of-the-art

programming, technical writing, imaging and animation skills having original ideas, artistic as well as intuitive. In view of the above technical aspects, this development work involved in the creation of web portal www.city4u.com is a highly creative and challenging task and in no circumstances, the same can be equated to the data entry jobs where the prime focus is to digitize the given content from paper into a text/image format without introducing any changes to the content. In view of this, we hold that creation of website is designing within the definition of the word 'design' for the purpose of claiming of deduction under Sec. 80-O of the Act. Accordingly, we allow the claim of the Assessee and the orders of the lower authorities are set aside."

Once it is held that the assessee is carrying out the design and the design is for the use of outside India, then the receipts will be treated to be falling under Section 80-O and accordingly, the assessee is entitled to deduction under Section 80-O.

6. We feel that the assessment order passed by the Assessing Officer where he has taken a view that the assessee is entitled for deduction under Section 80-O is neither erroneous nor prejudicial to the interest of the Revenue. Even on merits, the assessee is in the business of designing as narrated above and the order of the Assessing Officer is not erroneous. Even otherwise, the twin conditions as enumerated by the Hon'ble Apex Court in the case of Malabar Industrial Co. Ltd. - Vs - CIT (2000 (243) ITR 83 (SC)) have not been satisfied. In view of the facts and circumstances, we feel that reviewing under Section 263 by the CIT is bade in law and the

same is quashed."

Aggrieved by the said order of the Tribunal, the appellant/Department is before this Court by filing the present appeal.

4. Learned counsel appearing for the respondent/assessee, raised a preliminary objection as to the maintainability of the case of the appellant by submitting that as per Instruction No.1979 dated 27.3.2000 read with Instruction No.2 of 2005 dated 24.10.2005, for preferring a tax case appeal, monetary limit is fixed and only if the tax effect exceeds Rs.4 Lakhs, appeal can be filed in respect of single cases and in respect of group cases, each case should individually satisfy the monetary limits and, therefore, cumulative tax effect cannot be taken into consideration. It is the submission of the learned counsel for the assessee/respondent that the assessee does not fall within any of the exceptions provided in the instruction mandating the department to prefer an appeal. Therefore, learned counsel for the assessee submits that the present appeal is not maintainable.

5. Heard the learned standing counsel appearing for the appellant/Department and the learned counsel appearing for the respondent/assessee and perused the materials available on record.

6. Even though these appeals were admitted on the questions of law, referred supra, we are not inclined to entertain these appeals in view of the preliminary objection made by the learned counsel for the respondent that the monetary limit to prefer an appeal is pegged at Rs.4,00,000/- by the Central Board of Direct Taxes vide Instruction No.2 of 2005, dated 24.10.2005 read with Instruction No.5 of 2007, dated 16.7.2007.

7. In the case on hand, the tax liability pertains to the additions made by the Assessing Officer on account of tower testing activities, which were characterized as 'design'. The preliminary objection of the assessee and the tax liability under the above heads is as under:

Preliminary objection on maintainability of Department's Tax Case.

Appeal:

Instruction No.1979 dated 27.03.2000 read with Instruction No.2 of 2005 dated 24.10.2005 fixed the monetary limit to prefer a Tax Case Appeal only if the tax effect exceeds Rs.4 Lakhs for each case taken singly, i.e., in group cases, each case should individually satisfy the monetary limits and therefore cumulative tax effect cannot be taken into consideration. The Assessee submits that the Assessee does not fall within any of the exceptions provided in the instruction mandating the department to prefer an appeal. The total tax effect excluding interest is as follows:

<i>Disputed Issue</i>	<i>Amount in Rs.</i>	<i>Working</i>		<i>Tax Effect in Rs.</i>
<i>Deduction u/s 80-O</i>	340966	<i>Tax @ 35%</i>	<i>1,19,338</i>	

		SC @ 2%	2,387	1,21,725
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8. The learned counsel appearing for the assessee also pleaded that the case of the assessee does not fall within the exceptions specified in Instruction No.1979 issued by the Central Board of Direct Taxes on 27.3.2000, where irrespective of revenue effect the matter should be contested by the Department. The relevant portion of the said instruction reads as under:

"3. Adverse judgments relating to the following should be contested irrespective of revenue effect:

(i) Where Revenue audit objection in the case has been accepted by the Department.

(ii) Where the Board's order, notification, instruction or circular is the subject-matter of an adverse order.

(iii) Where prosecution proceedings are contemplated against the assessee.

(iv) Where the constitutional validity of the provisions of the Act are under challenge."

9. The learned Standing Counsel for the Revenue is not disputing the fact that the tax effect in the present case is less than Rs.4 Lakhs and that the assessee's case does not fall within the exceptions specified in Instruction No.1979, dated 27.3.2000.

10. It is brought to the notice of this Court that in an earlier decision in

Commissioner of Income Tax, Salem – Vs – Dr. C.T.Kiruba (T.C. (A) Nos.1011 & 1012 of 2007 – dated 19.1.2015), in similar set of facts, this Court has dismissed the appeal filed by the Department as not maintainable.

11. Considering the circulars issued by the Central Board of Direct Taxes and the tax effect involved in the case on hand, this Court is not inclined to entertain this appeal. Accordingly, without going into the merits of the questions of law formulated and in the light of the earlier decision of this Court in *Dr.C.T.Kiruba's case (supra)*, this appeal is dismissed as not maintainable. However, there shall be no order as to costs.

(R.S.J.) (R.K.J.)
17.02.2015

Index : Yes/No
Internet : Yes/No
GLN

To

1. Commissioner of Income Tax
Chennai.
2. The Income Tax Appellate Tribunal
'C' Bench, Chennai.

R.SUDHAKAR, J.
AND
R.KARUPPIAH, J.

GLN

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