IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 18.12.2015

CORAM:

THE HONOURABLE MR.JUSTICE R.MAHADEVAN

WP.No.4682 of 2003

K.Sailendrakumar
Petitioner

Vs

1.The Assistant Commissioner of Income Tax
City Circle II(3), Chennai-34

2.The Commissioner of Income Tax, Tamil Nadu-III
121, M.G.Road, Chennai-34
Respondent

Prayer:- This Writ Petition is filed to issue a Writ of Certiorarified Mandamus to call for the records of the Respondents and to quash the intimation under Section 143(1)(a), dated 18.3.1997 issued in File No.23729-S and the consequential order under Section 264 of the Income Tax Act No.1122/TN-III/2000-2001, dated 26.3.2001 and to direct the Respondents to modify the orders excluding the addition relating to unrepatriated export proceeds, treating the amount as bad debt or trading loss.

For Petitioner : Mr.R.Krishnamoorthy
Senior Counsel for
Mr.Ayyadurai

For Respondent : Mr.T.Promod Kumar Chopda,
Senior Standing Counsel

ORDER

This Writ Petition is filed against the intimation issued under Section 143(1)(a), dated 18.3.1997 by the 1st Respondent and the consequential order passed under Section 264 of the Income Tax Act, dated 26.3.2001 by the 2nd Respondent and for a direction to the Respondents to modify the orders.

2. The case of the Petitioner is as follows:-

a. The Petitioner is 100% exporter of garments under the name and style of M/s.Chaithanya Export and is eligible for deductions under Section 80 HHC. During the assessment year 1996-1997, the Petitioner exported garments to the tune of Rs.70,85,271/-. The Petitioner submitted an application for extension of time for repatriation of the export sale proceeds on 27.11.1996 before the 2nd Respondent, who by notice dated 9.1.1997, called upon the Petitioner to appear before him on 20.1.1997 and accordingly, the Petitioner appeared. By letter dated 26.2.1997, the 2nd Respondent asked the Petitioner to contact the office after realizing the foreign exchange dues. The 1st Respondent, assessing officer issued a letter on 12.08.1998, asking the Petitioner to intimate him within ten days the outcome of the said application. By notice dated 28.12.1998, the 2nd Respondent asked the Petitioner to appear on 4.1.1999. On 11.01.1999, the Petitioner filed a letter before the 1st Respondent, explaining the circumstances leading to the non realisation of the export sale proceeds and brought to his notice of the fact that the Reserve Bank of India by their communication dated 8.9.1998 had confirmed that non-realisation of the export proceeds in question was condoned and permitted the writing off of the outstanding amount as 'non realisable'. Hence, the Petitioner sought to revise the return, by claiming the same as a bad debt or trading loss for the assessment year 1996-1997. While so, the Petitioner received an intimation dated 18.3.1997 under Section 143(1) of the Income Tax Act, demanding Income Tax and interest for the assessment year 1996-1997, after adjusting the advance tax paid and additional tax under Section 143(1A) to the tune of Rs.10,94,471/-. Aggrieved by the same, the Petitioner filed a petition dated 19.6.1999 under Section 264 of the Act before the 2nd Respondent on 24.6.1999.

b. The intimation dated 18.3.1997 was served on the Petitioner only on 11.4.1999. As per the provisions of Section 143(1), no intimation can be sent after the expiry of two years from the end of the relevant assessment year. The Petitioner, by letter dated 16.2.2001, submitted all relevant documentary evidence in support of his claim before the 2nd Respondent. After hearing the representative of the Petitioner, the 2nd Respondent passed the impugned order dated 26.3.2001 under Section 264 of the Act, confirming the order of the 1st Respondent and held that the benefit of claiming the amount of Rs.70,85,271 may be allowed for the year 1999-2000. Thereafter, the 1st Respondent initiated recovery proceedings, by issuing a show cause notice dated 8.1.2003 for imposition of penalty under Section 221(1) of the Income Tax Act for non payment of tax. Hence, this Writ Petition has been filed for the relief as stated above.

3. The Respondents filed a counter affidavit, wherein it is averred as follows:-

a. The Petitioner claimed unrealized export turn over of Rs.70,85,271/- as a part of total export turn over of Rs.5,41,53,094/- for the purpose of claiming deduction under Section 80HCC. The Assessing Officer, while processing the return under Section 143(1)(a) on 18.3.1999 (originally in the intimation, the date was wrongly mentioned as 18.3.1997, but later it was corrected as 18.3.1999), made an adjustment of 80HCC benefit available to the Petitioner, on account of non realization of export receipts. With reference to the claim of the assessee to consider the above amount as bad debt, the same can be done only in the year, in which it has actually became bad and is written off by the assessee in the books of accounts. Subsequently, at the time of processing the return for the assessment year 1999-2000 on 26.12.2001, the year in which the assessee wrote off the export proceeds receivable, the amount of Rs.70,85,270/- was adjusted against the returned income of Rs.8,94,270/- and the total income was determined at a loss figure of Rs.61,91,000/-. In the meanwhile, the assessee filed a petition under Section 264 on 24.6.1999, which was rejected on 26.3.2001. This Writ Petition has been filed after a period of 22 months from the date of the order of the 2nd Respondent.

b. The intimation under Section 143(1)(a) was passed on 18.3.1999 and not on 18.03.1997. On the basis of the order sheet and exchange of letters with the assessee dated 31.8.1998 and 4.9.1998, it is clear that the intimation could have been issued only on 18.3.1999 and not on 18.3.1997 and the date was wrongly mentioned in the concerned intimation. Therefore, there is no substance in the claim of the Petitioner that intimation was issued on 18.3.1997 and as a consequence charging of interest under Section 234B up to the date of 18.03.2009 is justified. The amount receivable had been written off as bad debt by the assessee himself in his books of accounts only for the assessment year 1999-2000 and accordingly, the same was considered in that year. The claim of the Petitioner that the same is a trading loss for the assessment year 1996-1997 is without any proper accounting principles or legal basis. The year in which deduction on account of bad debts can be claimed is also subject to the condition of write off of such bad debts in the books of accounts as irrecoverable as per the relevant provisions of the Income Tax Act. The claim of the Petitioner for treating the unrealised foreign exchange dues as “bad debts” had rightly been rejected by the Assessing Officer in view of the fact that the so called 'debts' had not actually become 'bad' during the relevant accounting year (AY 1996-1997) as per the terms and conditions laid down under Section 36(2) of the Act. The return of income for the assessment year 1996-1997 was processed under Section 143 (1) on 18.3.1999 reworking the claim for deduction under Section 80HHC only after the admission by the Petitioner by his letter dated 11.1.1999 that the foreign exchange dues had not been realized. In such circumstances, there is no infirmity in the impugned orders and hence, this Writ Petition is liable to be dismissed.

4. The learned Senior Counsel for the Petitioner has assailed the impugned orders, by contending that when the amount has been proved to be unrealisable, the 1st Respondent ought not to have disallowed the deduction under Section 80HCC and that even if the claim is not allowed as a bad debt pertaining to the relevant accounting year, the amount of Rs.70,85,271/- ought to

have been allowed as a trading loss and the said amount ought to have been excluded from the computation of the profits. The impugned order dated 18.3.1997 has been issued only on 11.4.1999, i.e. beyond the period of two years from the end of assessment year 1996-97 and therefore, it is barred by limitation and sought for the reliefs as prayed for in this Writ Petition, relying on the decisions reported in 1992 1 Bom CR 550 (Khatau Junkar Limited Vs.K.S.Pathania), 2006 281 ITR 1 Delhi (Commissioner of Income Tax Vs. Lunar Diamonds Limited) and 1988 69 STC 62 (Government Wood Works Vs. State of Kerala).

5. The learned Senior Standing Counsel for the Respondents reiterated the averments made in the counter affidavit and supported the impugned orders.

6. This court heard the learned counsel on either side and considered their submissions and also perused the materials placed on record, including the relevant provisions of the Act.

7. It is the contention of the Petitioner that the impugned intimation dated 18.3.1997 issued under Section 143(1)(a) by the 1st Respondent is wholly illegal and without jurisdiction and that when the amount has been proved to be unrealisable, the 1st Respondent ought not to have disallowed the deduction under Section 80HCC and the claim of bad debt ought to have been allowed only for the assessment year 1996-1997 and for making additions, only a notice under Section 143(2) ought to have been issued, besides that, the impugned intimation is barred by limitation.

8. On the contrary, it is contended on behalf of the Respondent Department that the intimation was passed on 18.3.1999 and not on 18.3.1997 and that the Assessing Officer, while processing the return under Section 143(1)(a) on 18.3.1999, made an adjustment of 80HCC benefit on the ground that the claim of bad debt can be done only in the year, in which it has actually become bad and is written off by the assessee in the books of accounts and accordingly, it was rejected in view of the fact that the so called 'debts' had not actually become 'bad' during the relevant accounting year i.e. 1996-1997, as per the terms and conditions laid down under Section 36(2) of the Act.

9. In order to consider the rival contentions on either side, at this juncture, it is necessary to look into the provisions of the Income Tax Act, 1961. The relevant provisions of Section 143 are as follows:-

> Section 143:- (1) Where a return has been made under section 139, or in response to a notice under sub-section (1) of section 142, such return shall be processed in the following manner, namely:—
>
> (a) the total income or loss shall be computed after making the following adjustments, namely:—

(i) any arithmetical error in the return; or

(ii) an incorrect claim, if such incorrect claim is apparent from any information in the return;

(2) Where a return has been furnished under section 139, or in response to a notice under sub-section (1) of section 142, the Assessing Officer shall,—

(i) where he has reason to believe that any claim of loss, exemption, deduction, allowance or relief made in the return is inadmissible, serve on the assessee a notice specifying particulars of such claim of loss, exemption, deduction, allowance or relief and require him, on a date to be specified therein to produce, or cause to be produced, any evidence or particulars specified therein or on which the assessee may rely, in support of such claim."

10. First of all, in so far as the point of limitation is concerned, it is relevant to refer to the decision reported in 2006 281 ITR 1 Delhi (Commissioner of Tax Vs. Lunar Diamonds Limited), wherein, while dealing with the question as to whether the notice under Section 143(2) was served within the time or not, the Delhi High Court has upheld the conclusion of the Tribunal that the burden was upon the Department to prove that the notice was served upon the assessee within the prescribed time and on failure to discharge such a burden on the part of the Department, the assessment order was liable to be set aside.

11. In the case on hand, according to the Petitioner, the intimation was served on 11.04.1999 i.e. beyond the period of two years from the end of the assessment year 1996-1997, thereby attracting the provisions of limitation. But, there is no evidence to prove that the intimation under Section 143(1)(a) was served on 11.04.1999. On the other hand, according to the Respondent Department, the date of the intimation is 18.03.1999 and not 18.03.1997, for which the Respondent Department relied on the exchange of letters with the Petitioner dated 31.08.1999 and 04.09.1999. Here also, neither the said letters are produced nor copies of the same are furnished, except merely stating so in the counter. However, the burden was upon the Respondent Department to prove that the notice was served on the assessee within the prescribed time. In any case, even if the date, as mentioned in the intimation itself i.e. 18.03.1997, is taken into consideration, it is apparent that the intimation under Section 143(1)(a) was well within the prescribed time and hence, not barred by limitation.

12. Now coming to the scope of Section 143, the Petitioner filed the returns for the assessment year 1996-97 on 30.11.1996, claiming a deduction of a sum of Rs.70,85,271/- out of

Rs.1,08,56,607/- under Section 80 HHC of the Act, subject to filing a petition seeking for extension of time for the delay in receipt of export sale proceeds. The Petitioner also filed a petition dated 27.11.1996, explaining the circumstances, under which the Petitioner was unable to realise the export proceeds and seeking extension of time for remittance of sale proceeds under Section 80HHC. The 2nd Respondent, by letter dated 26.2.1997, directed the Petitioner to contact after fully realising the foreign exchange dues. The Petitioner also sent a letter dated 8.2.1999 to the 1st Respondent, requesting to rectify the return filed already by adjusting the claim under Section 80 HHC and allowing the unrealisable export as abnormal loss during the year 1996-97, quoting the letter of the Reserve Bank of India dated 8.9.1998, condoning the non realisation of export proceeds, however subject to surrender of proportionate amount of incentives, if any, received by the exporter and arriving at the total amount at Rs.88,75,216/-. It is also seen from the report of Attorneys at Law, Menon & Posner, dated 17.3.1998 that the Petitioner was not able to realise the export proceeds from the party to whom the exports had been made.

13. While so, by the impugned intimation under Section 143(1)(a), the Assessing Officer demanded the income tax for the assessment year 1996-1997 to the tune of Rs.10,94,471, including the additional tax under Section 143(1A) and interest under Section 234, rejecting the claim of deduction under Section 80HCC on the ground of non realisation of export proceeds and on the ground that the same can be considered only in the year in which it has become bad and is written off by the assessee in the books of the accounts for the assessment year 1999-2000.

14. As against the impugned intimation under Section 143(1)(a), the Petitioner filed a petition dated 24.06.1999 under Section 264 of the Act before the 2nd Respondent. While considering the said Petition, the 2nd Respondent, observed that the assessee actually wrote off the amount only for the assessment year 1999-2000 and the details, as called for by the letter of the RBI dated 8.9.1999, were not received and hence, the benefit of extension under Section 80HHC of the Act could not be given and the same can only be considered as a bad debt which became bad in the year it was actually written off by the Petitioner for the assessment year 1999-2000, relying on the provisions of Section 36 (2) of the Act.

15. It is also pertinent to note that the 2nd Respondent in the impugned order has observed that based on the facts, the Assessing Officer should again check up the arithmetical correctness of the levy, keeping in view the provisions of Section 143(1)(a) of the Act, which provides for processing of returns after making the adjustments of any arithmetical error in the return or any incorrect claim, if such incorrect claim is apparent from any information in the return. Further, the RBI also condoned the non realisation of export proceeds subject to

surrender of proportionate amount of incentives, if any, received by the Petitioner.

16. From a perusal of the Section 143(1) of the Act, it can be inferred that if, on the basis of the return, any tax or interest is found due after adjustments, as set out in the Section, an intimation shall be sent to the assessee specifying the sum payable and therefore, such an intimation can be sent only on the basis of the return. Section 143(1)(a) provides only for adjustments of any arithmetical error in the return or any incorrect claim, while processing the returns.

17. In so far as the contention of non issuance of notice under Section 143(2) is concerned, it is relevant to refer to the decision reported in 1992 1 Bom CR 550 (Khatau Junkar Limited and another Vs. K.S.Pathania and Another), wherein it was held as under:-

" 53. For reasons which we have set out earlier, while dealing with Writ Petition No. 2587 of 1991, under section 143(1)(a) of the Income-tax Act, the Income-tax Officer can only disallow such relief as is prima facie inadmissible on the basis of the information available in such return and the accounts and documents annexed to it. It is contended by Dr. Balasubramanian who appears for the respondents that the amount, which is transferred by the petitioner to the share revaluation reserve account, is available from the documents which are furnished by the company itself. Hence, it is permissible for the Income-tax Officer to add this amount to the book profits of the company. This submission is fallacious. What the Income-tax Officer has done is to reject the basis on which the company has filed its accounts and calculated its book profits for the relevant accounting year. The Income-tax Officer has not accepted the transfer of the above amount to the share revaluation reserve account, although, according to the petitioners, it is permissible as per accounting practice and should not be considered as a part of the book profits of the company. This is not the kind of adjustment which is contemplated under section 143(1)(a) of the Income-tax Act. In the guise of adjustment, the Income-tax Officer cannot reject the profit and loss account filed by the company nor can he change the basis of allocation of various amounts made by the company in its various accounts. For this purpose, it is necessary that the Income-tax Officer should issue a notice to the assessee under section 143(2) of the Income-tax Act and, after hearing the submissions of the assessee, decide the question in accordance with law. He cannot, unilaterally, and without any reference to the assessee, sent an intimation rejecting the entire profit and loss account of the

> assessee-company and substituting his own calculations. This is neither the correction of a clerical error nor is it the correction of an arithmetical error, as is submitted in the alternative by Dr. Balasubramanian. For the reasons which we have set out earlier, the Income-tax Officer has, therefore, acted beyond his jurisdiction in calculating the total income of the company in the manner in which he has done in the present case.
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> 54. In the premises, the petition is allowed and the rule is made absolute in terms of prayers (a) and (b). The Income-tax Officer is directed to deal afresh with the return of the petitioners in accordance with law. The respondent to pay to the petitioners costs of the petition.

18. In the case relied on by the Petitioner reported in 1992 1 Bom CR 550 cited supra, it was found that there was neither correction of a clerical error nor an arithmetical error and the adjustment was made thereon is not contemplated under section 143(1)(a). If at all, for this purpose of making adjustment, it is necessary that a notice to the assessee under section 143(2) of the Income-tax Act ought to have been issued.

19. In the case on hand, it is not the case as if there was an arithmetical error as projected by the Petitioner, inasmuch as the Petitioner's claim was one for deduction under Section 80 HHC for non recoverable export proceeds for the assessment year 1996-1997, but on the other hand, it was the claim of the Respondent Department that there was incorrect claim of deduction under Section 8HCC. Though as per Section 143(1)(a)(i), only an arithmetical error could be corrected, since it is seen that there is no arithmetical error apparent and in terms of Section 143(1)(a)(ii), since the Assessing Officer was of the opinion that the claim of the Petitioner was inadmissible and that there was incorrect claim of deduction under Section 80HHC on account of non realisable export proceeds and since it can be done only in the year in which it was written off in the books of accounts, the impugned intimation has been made imposing additional tax and interest, after adjusting the advance tax paid and ultimately disallowing the claim under Section 80 HHC. The 1st Respondent could have made only adjustments or additions permissible within the scope of the provisions of Section 143(1)(a). If the 1st Respondent intends to make such additions, such as additional tax, interest or any other additions and adjustment of deduction under Section 80HHC, he ought to have issued a notice under Section 143(2) of the Act, since Section 143(2) empowers the Assessing Officer to issue a notice, calling upon the assessee to produce evidence in support of the claim, when he comes to a conclusion that the claim made by the assessee is inadmissible. Admittedly, there is no notice served under the Section 143(2),

before rejecting the claim of deduction under Section 80HHC. Therefore, non issuance of a notice under Section 143(2) would vitiate the entire proceedings and on this ground alone, the impugned orders are liable to be set aside.

20. However, now, coming to the issue of claim of deduction under Section 80HHC, it is seen from the returns filed by the Petitioner for assessment year 1999-2000, a deduction of Rs.1,19,58,029/- was claimed under Section 80 HHC. If the Petitioner really wants to agitate the claim under Section 80HHC for the assessment year 1996-1997, it is not known as to why such a deduction under Section 80HHC was again claimed in the returns filed for the assessment year 1999-2000, for which no explanation is forthcoming from the Petitioner nor there is any other details given regarding the same to show that they are different non realised export proceeds for different assessment years.

21. In this regard, it is relevant to refer to the decision reported in 2003 260 ITR 1 Nag (South Eastern Coalfields Limited vs Joint Commissioner Of Income Tax), wherein while dealing with the question as to whether deduction on account of bad debt has to be allowed in the year in which it is written off, it has been held as thus:-

> ""19.2. It is also observed that a similar issue came up for consideration before the Calcutta Bench of Tribunal in Kalawati Debi Harak Lal v. CIT (1964) 53 TTR 313 (Cal) and after taking into consideration the object and ambit of the amendments made in 1987 as explained in the aforesaid circular as well as the combined effect of such amendment made to Section 36(1)(vii) and Section 36(2)(iii)and (iv), the Tribunal held that from the assessment year 1989-90, deduction on account of bad debt has to be allowed in the year in which it is written off by the assessee and there is no other option available to the AO. A similar view has also been expressed by the Chennai Bench of Tribunal in the case of New Deal Finance & Investment Ltd. v. Dy. CIT (2000) 69 TTJ (Chennai) 410 : (2000) 74 ITD 469 (Chennai) wherein it is held that after the amendment of Section 36(1)(vii) w.e.f. 1st April, 1989, if debt has been written off as irrecoverable in the accounts of the assessee for the previous year, it will suffice for claiming it as a bad debt and the assessee can never be called upon to prove that the said debt has become bad. In the present case, the relevant debts have been written off by the assessee as bad in the books of account relevant to assessment year 1995-96 and this fact is not in dispute. As such, considering all the facts of the case and respectfully following the aforesaid decision of the Tribunal, we hold that the assessee was entitled for the deduction on account of bad debts for the assessment year 1995-96 and not in

assessment year 1996-97 as allowed by the Revenue. We order accordingly.”

22. Though the Petitioner is eligible to claim deduction under Section 80HHC, the dispute is only with regard to the assessment year in which it can be claimed. The Petitioner claimed the deduction under Section 80HHC for the assessment year 1996-1997. But, it is seen from the returns filed for the assessment year 1999-2000, there was also a similar claim of deduction under Section 80HHC, which had made the authority to come to the conclusion that the claim of the Petitioner can be made only for the assessment year 1999-2000 in which it has been written off. It is also observed by the 2nd Respondent that the Assessing Officer should correct the arithmetical errors if any and that the assessee had failed to make out any case by producing valid evidence. Further, according to the RBI's letter, the total amount amount of deduction was Rs.88,75,216/- but whereas, the Petitioner's claim was for a sum of Rs.70,85,271/-. In such circumstances, though it can be stated that the Assessing Officer has acted beyond his jurisdiction, without application of mind, while demanding the tax and interest by the intimation under Section 143(1)(a), by not following the procedures contemplated under Section 143(2), in view of the said discrepancies and for want of valid evidence on both sides, the matter can be decided afresh, on remand.

23. In view of the above discussions and in the light of the provisions of law above discussed, the impugned orders are set aside. The matter is remanded back to the Respondents for fresh consideration. The Respondents are directed to consider the matter afresh and pass appropriate orders, after giving sufficient opportunity to the Petitioner, on merits and in accordance with law, within a period of eight weeks from the date of receipt of a copy of this order. If the petitioner fails to avail this opportunity, it is open to the respondent to pass appropriate orders on merits.

24. With the above directions, this Writ Petitions is disposed of. No costs.

Sd/-
Asst.Registrar (J)

/true copy/

Sub Asst. Registrar

Srcm/rsb

To:

1.The Assistant Commissioner of Income Tax,
City Circle II(3), Chennai-34

2.The Commissioner of Income Tax,
Tamil Nadu-III, 121, M.G.Road, Chennai-34

1 cc to Mr.V. Ayyadurai, Advocate, Sr. 68565
1 cc t Mr.T. Pramodkumar Chopda, Advocate, Sr. 68483

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NM (CO)
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