

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

**ITA No.49 of 2001
Date of decision: 29.9.2015**

M/s Punjab Communications Limited

.....Appellant

Commissioner of Income Tax, Chandigarh

.....Respondent

**CORAM: HON'BLE MR. JUSTICE AJAY KUMAR MITTAL
HON'BLE MR. JUSTICE RAMENDRA JAIN**

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

Present: Mr. Pankaj Jain, Sr. Advocate
Mr. Divya Suri, Advocate for the appellant-assessee.

Ms. Urvashi Dhugga, Advocate for the respondent-revenue.

Ajay Kumar Mittal,J.

1. This order shall dispose of ITA No.49 of 2001, 200 and 187 of 2002 as according to the learned counsel for the parties, the issues involved in these appeals can be disposed of together. However, the facts are being extracted from ITA No.49 of 2001.

2. ITA No.49 of 2001 has been preferred by the appellant-assessee under Section 260A of the Income Tax Act, 1961 (in short, "the Act") against the order dated 17.5.2000 passed by the income Tax appellate tribunal, Chandigarh Bench in ITA Nos.1263 and 1268/CHD/1992 for the assessment years 1987-88 and 1988-89, claiming following substantial

questions of law:-

“i) Whether under the facts and circumstances of the case, the Tribunal was justified in setting aside the orders of learned CIT (A) in so far as directing the learned AO in allowing the deduction under section 80I after reducing the amount of deduction allowable to the appellant under section 32AB of the Income Tax Act, 1961 whereas the issue was on the quantification/computation of the claim under section 80I to be allowed as deduction under section 80B(5) and the said computation/ascertainment of the amount should have been on the profits and gains of the undertaking without deduction of claim under section 32AB out of such profits?

ii) Whether under the facts and circumstances of the case, the Hon'ble Tribunal is justified by not referring the matter to a special bench on the issue in dispute?”

In ITA No.187 of 2002 for the assessment year 1990-91, in addition to the above two questions, the third question claimed by the assessee reads thus:-

“iii) Whether under the facts and circumstances of the case, the Tribunal was justified in rejecting the claim of the appellant that in respect of 5% to 10% of the sale price in each year of supplies no income accrues or arises for which the amount was released against the bank guarantees as the performance of the contract was not completed by giving a finding that the claim of the appellant is against a contingent liability and which has not accrued or arisen during the year under appeal?”

ITA No.200 of 2002, has been filed by the revenue for the assessment year 1990-91 claiming the following substantial question of law:-

“(iv) Whether on the facts and in the circumstances of the case, the Hon'ble ITAT is justified in law in directing the Assessing Officer to recompute the claim of the assessee under section 32AB by taking the utilization of the plant and machinery

purchased by the assessee as a whole and not relate/restrict it to the extent of plant and machinery purchased for the eligible unit?”

3. In so far as Question No.(ii) quoted above is concerned in ITA No.49 of 2001 and similar question claimed in ITA No.187 of 2002, the same being not a substantial question of law, is, thus, declined.

4. A few facts relevant for the decision of the controversy involved as narrated in ITA No.49 of 2001 may be noticed. The assessee is engaged in the business of manufacturing of Telecommunications Equipments like big Telephone Exchanges for Railways, Defence, C-Dot and other Public Sector companies as used in Tele communications carrier Centre between trunk Exchanges and Micro Wave Transmission terminals. It is a wholly owned Punjab Government Company. It has offered shareholding to the public at large and its shares are quoted at the Stock exchange having its registered office at Mohali. There are different units/industrial undertakings for different products. The claim of the appellant was for allowing deduction under Section 32AB of the Act for ₹ 18,72,739/- and ₹ 23,27,233/- while claim under Section 80I of the Act was for ₹ 23,40,940/- and ₹ 29,20,496/- for the assessment years 1987-88 and 1988-89 respectively which was calculated by the appellant as per the provisions of law as both the deductions were independent claims. The Assessing Officer allowed claim under Section 32AB of the Act but allowed deduction under Section 80I of the Act amounting to ₹ 18,43,642/- and ₹ 23,27,233/- for the respective years to be calculated after reducing the claim under Section 32AB of the Act in respect of those units being eligible whereas it should have been calculated separately as provided under Section

80I of the Act on the profits and gains of those undertakings. The assessee went in appeal before the Commissioner of Income Tax (Appeals) [CIT(A)]. Vide order dated 3.3.1992, the CIT(A) decided the issue in favour of the assessee. Aggrieved by the order, the revenue filed appeals before the Tribunal. The Tribunal vide order dated 17.5.2000 decided the issue against the assessee reversing the decision of the CIT(A) holding that deduction under section 80I of the Act was to be allowed after reducing the deduction allowable to the appellant under section 32AB of the Act. Hence the instant appeals by the assessee.

5. We have heard learned counsel for the parties.

6. A perusal of the findings recorded by the authorities below shows that the Assessing Officer did not allow the claim of the assessee under Sections 80I and 32AB of the Act on the ground that the assessee did not qualify for the said deduction being in the manufacture of items specified in Schedule 11 of the Act. On appeal by the assessee, the CIT(A) decided the issue in favour of the assessee but while giving effect to the orders of the CIT(A), the Assessing Officer allowed deduction under Sections 80I and 32AB of the Act for the assessment years 1987-88 and 1988-89 and while computing the quantum of deduction under section 80I of the Act, reduced the amount of deduction available to the assessee under Section 32AB of the Act. The assessee preferred appeal before CIT(A) challenging the said order where the issue was decided in favour of the assessee and the Assessing Officer was directed to compute deduction under Section 80I of the Act without reducing the deduction allowable to the assessee under Section 32AB of the Act. On appeal by the revenue, the

Tribunal reversed the decision taken by the CIT(A) holding that deduction under Section 80I of the Act was to be allowed after reducing the deduction allowable to the appellant under Section 32AB of the Act. The Tribunal after considering the matter in detail recorded as under:-

“8. We have carefully considered the rival submissions and have perused the order of the tax authorities. We have also seen the case laws relied upon by both the parties. We feel that the submissions made by the learned DR have force and that the provisions of section 80AB and 80B(5) have been interpreted in various judgments in favour of the department. In this connection, reference may be made to the decision of the Hon'ble Rajasthan High Court in the case of CIT vs. Loonkar Tools Pvt. Limited, 213 ITR 721 wherein the provisions of Sections 80B and 80HH have been considered and it had been held that depreciation and investment allowance have to be deducted before giving the special deduction under section 80HH under Chapter IA. The High Court also held that the Tribunal was not justified in holding that deduction under Section 80HH was to be computed on the commercial profits. Similarly, the Hon'ble High Court have held in the case of CIT vs. M/s Rajaram Maize Products, 145 Taxation, 319 that in view of sections 80AB and 80B(5) deduction is to be allowed on profits under sections 80HH and 80I as computed after deduction under section 32AB. We may also refer to the decision of the Special Bench of the Tribunal in the case of Century Iron and Steel Limited vs. ITO 31 ITD 117 wherein the provisions of sections 80AB and Section 80HH were considered. The Tribunal observed that Section 80HH is made subject to the provision of Section 80AB and does not operate in isolation or independent of that section. The Tribunal also observed that it has been clarified by categorical provisions made in section 80AB that the deduction should be with

reference to the balance of income. It was also observed that where the gross total income computed as stated in Section 80B (5) in all figure or a loss, the question of deduction under any or all of the sections in Chapter IA will not arise even though 20% of the profits and gains in respect of the specified industrial undertaking may be a positive figure, however, large it may be.

9. We may also refer to the decision of the Hon'ble Rajasthan High Court in the case of CIT vs. Rajendra Textiles, 225 ITR 516 wherein it has been held that the special deduction under Section 80HH is to be calculated on net income after deduction of depreciation, investment allowance etc. The Hon'ble High Court followed its decision reported in 218 ITR 71. The said decision was also followed in the case reported in 225 ITR 374. We may further refer to the decision of the Hon'ble Supreme Court in the case of Moti Lal Pesticides (India) Pvt. Limited vs. CIT, 243 ITR 26 wherein the provisions of sections 80AA, 80AB and 80HH have been considered and it has been held that as a result of insertion of section 80AA and 80AB, special deduction under section 80HH is to be allowed only on net income and not on gross income. The Apex Court observed that the provisions of section 80AB were introduced w.e.f 1.4.1981 and they were made applicable to all the sections in Chapter IA except Section 80M. The Apex court noted that it had specifically overruled its earlier decision in Cloth traders Pvt. Limited 11B ITR 243 (SC) and held that deduction was to be allowed only on the net dividend income and not the gross income. It observed that with reference to section 80AB, the Apex Court had said that it was merely of a classificatory nature. The Apex Court further observed that on a parity of reasoning with section 80AA, as given in Distributors (Baroda) Pvt. Limited vs. Union of India, 155 ITR 120 (SC), it must be held that Section 80AB was enacted to declare the law as it always stood in relation to the deductions to be made in respect of the income specified under the head 'C' in Chapter IA. It

concluded that the special deduction under Section 80HH is allowable on the net income and not the gross income. The Apex Court followed its earlier decision reported in 205 ITR 433.

10. In view of the aforesaid case laws, we feel that the issue requires to be decided in favour of the revenue. The case law relied upon by the learned counsel is either distinguishable on facts or is not applicable. Accordingly, we set aside the orders of the CIT(A) in relation to both the assessment years on this issue and restore the orders of the AO for both the years i.e. deduction under Section 80I is to be allowed after deduction under Section 32AB.”

Learned counsel for the assessee was unable to demonstrate that the approach of the Tribunal was erroneous or perverse in any manner in allowing deduction under Section 80I of the Act after reducing the deduction allowable to the assessee under Section 32AB of the Act. We endorse the view of the Tribunal and consequently question No.(i) noticed above is answered against the assessee.

7. With regard to the question (iii) in ITA No.187 of 2002, it may be noticed the assessee made supplies to various parties on the basis of contract entered into with them. The assessee claimed 5% to 10% of the amount as performance security and submitted that the income to that extent had not accrued to it. The Assessing Officer did not deal with the issue as per claim of the assessee. The assessee filed appeal before the CIT (A) who held that the claim of the assessee was not admissible and the amount of full value of sale as depicted in the profit and loss account had been correctly disclosed and hence taxable. The Tribunal held that the assessee shall be entitled for deduction of the amount to meet the obligation

which may arise under the warranty clause in the year in which the claim was actually lodged by the client i.e DOT or MTNL and the income had actually accrued and arisen and it could not be said that the probable obligation which may or may not arise under the warranty clause did not give rise to the income.

8. Learned counsel for the assessee relied upon judgments in *CIT vs. Jay Bee Industries, (2008) 171 Taxman 386 (P&H)*, ITA No.167 of 2002 (*Haryana Roadways Engg. Corporation Limited, Gurgaon vs. Commissioner of Income Tax, Rohtak*) decided on 8.11.2010 (P&H) and *CIT vs. Sony India (P) Limited, (2007) 160 Taxman 397 (Delhi)* to contend that the warranty security for repair/replacement was an existing liability at the time of sale and was thus an allowable deduction. On the other hand, learned counsel for the revenue supported the order passed by the Assessing Officer, CIT(A) and the Tribunal.

9. We find merit in the submission of learned counsel for the assessee-appellant. The various judgments relied upon by learned counsel for the assessee supports his contention. In *Jay Bee Industries'* case (supra), the question before this Court was whether provision of warranty for repairs/replacement was an existing liability at the time of sale and was allowable as deduction. It was answered in the affirmative. In *Haryana Roadways Engg. Corporation Limited's* case (supra), this court was dealing with the issue whether an amount of ₹ 2000/- per vehicle to be charged by the Haryana Roadways for removal of any post-manufacturing defects or for maintenance of the bodies of the buses was an admissible expenditure relating to the assessment year in question. It was held that the Tribunal was

not justified in restricting the amount of deduction at ₹ 1000/- per vehicle there being no material before the authorities to restrict the deduction to an amount other than as claimed by the assessee. In *Sony India (P) Limited's* case, (supra), it was held by the Delhi High Court that the liability arising out of a warranty was an allowable deduction even when the amount payable by the assessee was quantified and discharged in future. Learned counsel for the revenue was not able to rebut the aforesaid contention. Accordingly, this question is answered in favour of the assessee and it is held that the authorities below were not justified in rejecting the claim of the appellant assessee that 5% to 10% of the sale price in each year of supplies does not accrue as income for the year on the basis of terms and conditions attributed to warranty/guarantee/after sale service or on account of non completion of the contractual obligation and the assessee has to offer performance security under the contract. It shall, however, form part of the income to the extent the liability ceases to exist in the year in which the obligation of the assessee stands discharged. The said question is thus answered in favour of the assessee and against the revenue.

10. Adverting to the question (iv) claimed by the revenue in ITA No.200 of 2012, the only issue that arises therein is whether the deduction to be allowed under section 32AB of the Act is to be restricted to each profit making unit of the assessee or by taking the utilization of the plant and machinery purchased by the assessee as a whole. The Assessing Officer had restricted the claim of the assessee under Section 32AB of the Act to the extent of plant and machinery purchased in each profit making unit and not on plant and machinery purchased by the assessee in other units as well

where there was loss. The appeal of the assessee on this issue was rejected by the CIT(A). However, the Tribunal on further appeal of the assessee, following the decision of Delhi Bench of the Tribunal in the case of *Phoneix Overseas Limited vs. CIT* reported in 56 ITD 274 directed the Assessing Officer to recompute the claim of the assessee under Section 32AB of the Act in respect of each unit taking the utilization of the plant and machinery purchased by the assessee as a whole and not relate it with each profit making unit of the assessee only, with the following observations:-

“11.1 The assessee claimed deduction under section 32AB as per his computation given at page 43 to 45A of the paper book i.e. on the basis of 20% of the profit of eligible business limiting it to the extent the amount has been deposited with IDBI or utilized for the purchase of plant and machinery by the assessee. The AO computed the claim of the assessee by restricting it to the extent of plant and machinery purchased for each unit and not to the extent of purchases made by the assessee for other units also. The assessee submitted that this is fully covered by the decision of ITAT Delhi Branch in the case of Pheonix Overseas Limited vs. CIT reported in 56 ITD 274 to which the learned DR did not object but relied on the order of the CIT(A).

11.2 We have heard both the parties and perused the material on record. We also have gone through the judgment of Delhi Bench of ITAT in the case of Pheonix Overseas Limited vs. CIT (supra) and we find that the case of the assessee is fully covered by the aforesaid judgment where on the similar issue, ITAT has held as under:-

“On plain reading of section 32AB it is not possible to hold that eligible business means the business of the undertaking where machinery is installed and not the business of the

assessee. There is no restriction placed on the assessee as per definition of eligible business to invest only out of the income of a particular unit. The definition of eligible business given in section 32AB(2) is an exclusionary definition. Every business other than the one excluded under clauses (a) and (b) of section 32AB (2) is eligible business qualified for deduction under the section. There is no justification under the section. There is no justification to restrict the meaning of eligible business to the unit where machinery is installed though the same is not covered by the exclusionary clauses. On consideration of the language, text and context of section 32AB as also the scheme of the Act, it was to be held that deduction under section 32AB was to be allowed out of total income of the assessee. Consequently the impugned order of the Commissioner was cancelled and that of the Assessing Officer was restored.

113. Following the aforesaid judgment, we direct the AO to recompute the claim of the assessee under section 32AB in respect of each unit taking the utilization of the plant and machinery purchased by the assessee as a whole and not relate it with each unit of the assessee on the basis of the aforesaid judgment of ITAT Delhi Bench.”

We find the approach of the Tribunal to be in consonance with the provisions of Section 32AB of the Act as there is nothing on the basis of which it could be deduced that deduction is to be allowed only out of the profit of a unit or undertaking where machinery is installed and not out of the profits of the assessee. Nothing was urged by learned counsel for the revenue to raise any challenge to the aforesaid finding of the Tribunal. In the absence of any issue raised by the revenue, no ground for interference by this Court is made out.

11. In view of the above, the substantial question of law (i) in ITA No.49 of 2001 is answered against the assessee whereas question No.(iii) in ITA No.187 of 2002 and Question No.(iv) in ITA No.200 of 2002 is answered in favour of the assessee and against the revenue. As a result, ITA Nos. 49 of 2001 and ITA No.200 of 2002 are dismissed whereas ITA No.187 of 2002 is partly allowed.

(Ajay Kumar Mittal)
Judge

September 29, 2015
'gs'

(Ramendra Jain)
Judge