

3

\$~
*
18.
+

IN THE HIGH COURT OF DELHI AT NEW DELHI

ITA 972/2015

COMMISSIONER OF INCOME TAX-VIII Appellant
Through: Mr. Kamal Sawhney, Senior Standing
counsel with Mr. Raghvendra K. Singh, Mr.
Shikhar Garg and Mr. Sharad Agarwal, Advocates.

versus

KHANNA BROTHERS Respondent
Through: Dr. Rakesh Gupta with Ms. Poonam
Ahuja and Mr. Rohit Kumar Gupta, Advocates.

WITH

ITA 967/2015

20.
✓

COMMISSIONER OF INCOME TAX-VIII Appellant
Through: Mr. Kamal Sawhney, Senior Standing
counsel with Mr. Raghvendra K. Singh, Mr.
Shikhar Garg and Mr. Sharad Agarwal, Advocates.

versus

KHANNA BROTHERS Respondent
Through: Dr. Rakesh Gupta with Ms. Poonam
Ahuja and Mr. Rohit Kumar Gupta, Advocates.

AND

4.
+

ITA 490/2015

PR. COMMISSIONER OF INCOME TAX-11 Appellant
Through: Mr. Rohit Madan, Senior Standing
counsel.

4

versus

KHANNA BROTHERS

..... Respondent

Through: Dr. Rakesh Gupta with Ms. Poonam
Ahuja and Mr. Rohit Kumar Gupta, Advocates.

CORAM:

JUSTICE S. MURALIDHAR

JUSTICE RAJIV SHAKDHER

ORDER

17.12.2015

%

CM No. 31181/2015 (for exemption) in ITA No. 972/2015

1. Exemption allowed subject to all just exceptions.
2. The application is disposed of.

**CM No. 31182/2015 (for condonation of delay in re-filing the appeal) in
ITA No. 972/2015**

3. For the reasons stated in the application, the delay in re-filing the appeal is condoned.
4. The application is disposed of.

ITA Nos. 972/2015, 967/2015 & 490/2015

5. These are three appeals by the Revenue under Section 260A of the Income Act, 1961 ('Act'). ITA Nos. 972 and 967 of 2015 are directed against the common order dated 14th June 2013 passed by the Income Tax Appellate Tribunal ('ITAT') in ITA Nos. 397/Del/2010 and 2210/Del/2012 for the Assessment Years ('AYs') 2006-07 and 2008-09 respectively. ITA Nos. 490 of 2015 is directed against the impugned order dated 13th February 2015 passed by the ITAT in ITA No. 227/Del/2013 for the AY 2010-11.

5

6. The common question that is sought to be urged in three appeals concerns the correctness of the order of the ITAT, upholding the order of the Commissioner of Income Tax (Appeals) ['CIT (A)'] holding that the Assessee was eligible to the deduction under Section 80IC of the Act and deleting the disallowance ordered by the Assessing Officer (AO) for the AYs in question.

7. The facts leading to the filing of these appeals are that the Assessee, Khanna Brothers, is a partnership firm. The Assessee filed its return for the AY 2006-07 on 31st October 2006 declaring a total income of Rs. 24,17,034. The Assessee claimed deduction of Rs. 22,58,647.72 in the computation of income on account of net profit from the Agartala Branch (Tripura) of the Assessee. The Assessee submitted the profit and loss (P&L) account for the Agartala Branch for the period 1st April 2005 to 31st March 2006, the balance sheet as on 31st March 2006 and the auditor's report in form Nos. 3CD and 10CCB. The auditor's report certified that the Assessee's units did not manufacture any article or thing specified in the 13th Schedule. The date of commencement of operation of the unit was 12th July 2005. In the Tax Audit report in form No. 3CD the business of the Assessee was described as 'manufacturing and fabrication of steel structure'. The case was picked up for scrutiny and notices under Sections 143 (2) and 143 (1) of the Act were issued.

8. The Assessing Officer ('AO') in the assessment order dated 30th December 2008 noted that the AY 2006-07 was the first year in which claim for deduction under Section 80IC of the Act had been made by the Assessee.

6

In response to a query as to how it could claim to be a manufacturing unit, the Assessee submitted the purchase order dated 30th December 2004 issued to it by M/s. Dharmpal Prem Chand Limited ('DPCL'). The subject of the purchase order was "fabrication, supply, shot blasting, painting and erection of steel structures for picking line and HR coil storage building (G-H & H-1 Boys) of our steel project at Agartala." It was further stated in the purchase order as under:

"With reference to your offer and subsequent discussions with you on the above subject, we are pleased to place the order on you for fabrication, supply, shot blasting, painting and erection of 660 MT +/- 2% of Steel structures including roofing and wall cladding for Pickling Line and HR Coil Storage buildings of our steel project at Agartala. The details of the building covered under your scope shall be as follows :

Total tonnage of 660 MT +/- 2% of fabricated steel structures shall be sand/shot blasted and given two coats of epoxy primer and one coat of finish plant prior to erection. The steel structures shall be painted with one coat of finish paint after erection. The entire work shall be executed strictly in conformity with the Technical details as given at enclosed detail fabrication drawings to be made available with you.

The total fixed price for the scope of work mentioned above shall be Rs. 6.50 crores (Rupees Six Crores and Fifty lakhs only).

The above mentioned price are on FOR site basis excluding Excise duty, Education Cess and Sales Tax (Inclusive of Freight and Transit insurance). "

9. Before the AO, the Assessee contended that it had paid the requisite excise duty and that it was registered with the Central Excise Authorities for manufacturing of excisable goods. It was stated that the land/shed had been taken from Tripura Industrial Development Corporation Limited in a notified industrial area. For the purpose of sales tax registration, the 'business' was indicated as 'manufacturing'. The unit was also registered under the Factories Act as a steel manufacturer. It was claimed that the fabrication work was in fact done in the premises of the Assessee at Agartala.

10. The AO observed that that the tax auditor had not given any description of finished goods as "no such article or thing manufactured or produced by the Assessee could be ascertained." The AO referred to the decision of the Supreme Court in *Commissioner of Income Tax v. N.C. Budhraj & Co. (1993) 204 ITR 412 (SC)* and held that the fabrication work done by the Assessee and erected at the factory site of the contractee cannot be called manufacture. A reference was made to the decision of the Supreme Court in *M/s. Builders Association of India v. Union of India (1994) 209 ITR 877 (SC)* where it was held that construction of a dam, building, bridge or road and the like cannot be brought within the purview of the word 'article' or 'thing' and therefore, investment allowance was not allowable under Section 32A of the Act.

8

11. Accordingly the AO added back to the income of the Assessee, for AY 2006-07, the sum of Rs. 22,58,648 claimed as deduction under Section 80IC of the Act.

12. The Assessee then appealed before the CIT (A). By an order dated 27th November 2009 while allowing the appeal of the Assessee, the CIT (A) disagreed with the AO and held that the Assessee was engaged in 'manufacture' of articles and was, therefore, eligible for deduction under Section 80IC of the Act.

13. The Assessee's return for AY 2008-09 was picked up for scrutiny and notice under Section 143 (2) was issued on 6th August 2009. A reference was made in the AO's order dated 31st December 2010 to the fact that on 9th March 2010 a survey operation under Section 133 of the Act was conducted at the Faridabad, Chandigarh and Agartala branches of the Assessee. By this time, the Chandigarh and Faridabad branches had been closed. During the course of the survey, the Assessee voluntarily offered undisclosed stock of the value of Rs. 1,01,17,491 for taxation.

14. In the order dated 31st December 2010 for AY 2008-09, the AO concluded that "during the course of survey operation, additional evidences have been gathered which prove that the Assessee was not a manufacturer of certain goods or articles which saleable independently in the open market, but it was mere a contractor for M/s. Dharampal Prem Chand Limited who was establishing a Tobacco factory unit in Agartala." The AO accordingly reached the same conclusion regarding ineligibility of the Assessee to claim deduction under Section 80IC of the Act.

15. Aggrieved by the above order of the AO, the Assessee filed an appeal before the CIT (A). By an order dated 30th January 2012 the CIT (A) allowed the Assessee's appeal by referring to the fact that survey operation had been carried out on 9th March 2010 therein it was found that the Appellant had only two or three employees during the Financial Year ('FY') 2006-07 and 2007-08 and there were only limited number of machines found at the factory which were no longer existed. On the issue of the Appellant being a manufacturer, the CIT (A) followed the order passed for the earlier AY. The CIT (A) noted that the Assessee after procuring the raw material had subjected it to various mechanical processes and transformed into a 'something else'. Accordingly, it was held that the Assessee was entitled to deduction under Section 80IC of the Act.

16. Against the above orders of the CIT (A) for the AYs 2006-07 and 2008-09, the Revenue filed appeals before the ITAT. By the impugned order dated 14th June 2013, the ITAT confirmed the order of the CIT (A) and dismissed the Revenue's appeals.

17. For AY 2010-11, a separate set of orders were passed by the AO and the CIT (A). The Revenue preferred another appeal before the ITAT, i.e., ITA No. 227/Del/2013. By the impugned order dated 13th February 2015 the ITAT followed its earlier order and thereafter affirmed the order of the CIT (A).

18. The first issue that is required to be addressed is whether the Assessee undertook any manufacturing activities in the units at Agartala during the

AYs in question. As noticed hereinbefore, the Assessee undertook the work of fabrication of steel for use by DPCL. Apart from fabrication, the work involved shot/sand blasting, painting and erection of the steel structures. The detailed fabrication drawings were provided by DPCL.

19. In *Commissioner of Income Tax v. Beehive Engineering Co. & Allied Industries (P) Ltd. (1996) 221 ITR 561 (AP)*, the Assessee was engaged in purchasing MS angles, joints, channels, etc., cutting them into required sizes, thereafter welding, drilling the pieces with holes and fitting them with nuts, bolts etc., for manufacturing trusses. The question whether the Assessee was an industrial company within the meaning of Section 2 (7) (c) of the Finance Act, 1978 was answered in the affirmative by the Andhra Pradesh High Court. It was held that "two things are clear, viz., (i) that for a company to be an "industrial company" within the meaning of the above said provision it is enough if the company is carrying on manufacturing of goods, and (ii) that the application of the Explanation would arise only in a case where the company is not mainly an industrial company; in such a case, if the income of that company from manufacture of goods exceeds 51 per cent, it would be treated as industrial company." The decision in *N.C. Budharaja (supra)* was distinguished since in that case the question was whether the construction of a dam in Orissa would be taken to be manufacturing of an article or thing. The view taken by the Orissa High Court that the activity of constructing a dam was an industrial activity was, in those circumstances, reversed by the Supreme Court. The said decision is, therefore, distinguishable in its application to a situation where there is a finding of fact that a manufacturing activity is being carried out by an

Assessee.

20. As far as the present case is concerned, the fabrication of steel as undertaken by the Assessee, which involves several of the processes does fall within the definition of 'manufacture' for the purposes of Section 80 IC of the Act. The decision in *CIT v. Beehive Engineering Co. (supra)* fully supports the case of the Assessee in this regard.

21. The question that next arises is whether during the AYs in question, it could be said that the Assessee was in fact carrying out any manufacturing activity in its units at Agartala? The case of the Revenue is that the CIT (A) and the ITAT failed to take note of the fact that a survey was undertaken on 9th March 2010 in which it transpired that the number of employees in the Financial Years (FYs) 2006-07 and 2007-08 was three and in the FYs 2008-09 and 2009-10 it came down to two. The survey team found that one unit was lying vacant covered with grass and shrubs with a deserted look and had an old rusted shed. In the other unit some scrap materials like, angles, bars etc. were lying around in a scattered manner on the ground. The survey team had noted that unused corroded winch machines were lying in one corner of the compound. The question raised was whether it was possible to produce/manufacture goods worth Rs. 8 crore in an FY with only three regular employees and few machines.

22. The CIT (A) has, in his order for AY 2008-09, taken note of the explanation offered by the Assessee that in one unit no work was being carried out for several years. As far as the second unit was concerned, the

last order was completed sometime in July 2009 and thereafter no work was done. It was pointed out by the Assessee that this explained why the survey team in March 2010 did not find any manufacturing activity underway in the said unit. Further under Section 80IC of the Act, there was no requirement that the Assessee had to directly employ a certain number of workers. In fact the manufacturing and fabrication work was done with the help of contract labour and documents had been furnished to show that labour work charges aggregating Rs. 1,66,17,876 was paid. The CIT (A), therefore, concluded in the order dated 30th January 2012 that the Assessee had furnished adequate evidence of fabrication and assembly of the steel structure for the steel project of DPCL at Agartala.

23. The ITAT has agreed with the factual findings of the CIT (A) for AY 2008-09 in which there is an extensive discussion of the survey report. This was followed for AY 2010-11. Therefore, it cannot be said that the ITAT and the CIT (A) failed to take note of the survey report.

24. The Court finds that the Assessee furnished the requisite documents to demonstrate that it carried on the aforementioned manufacturing activity at its Agartala unit. The Assessee produced during the assessment proceedings as well the appellate proceedings copies of the excise returns filed by it before the Central Excise authority at Agartala, the bills of machinery and of raw material purchased, details of freight and cartage for purchase of raw material, and details of job work paid. Documents to show that the Assessee paid Rs. 1.66 crores for the fabrication work carried out with the help of contract labour were produced. Further, the documents of registration with

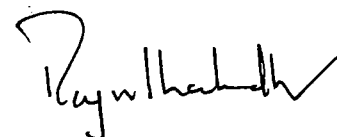
the VAT, CST, Service Tax, and Central Excise Authorities were furnished. The Assessee also produced details of the rent paid to the Tripura Industrial Development Corporation Ltd., the bills of construction of the factory sheds and the details of payment of electricity charged to Tripura State Electricity Corporation Ltd. The appellant has produced the bills purchase of the machinery installed at the premises, comprising drilling machines, welding machines, motors, gas cutting machines.: air compressor, etc. It produced details and bills of purchase of raw material comprising nuts, bolts, rods M.S. angles, channels, HR sheets metal etc. As rightly pointed out by the Assessee there was no requirement under Section 80 IC that the Assessee had to employ 10 or more workers directly. In the circumstances there appears to have been no justification for the AO to disallow the deduction under Section 80IC of the Act for the AYs in question.

25. No substantial question of law arises for determination.

26. The appeals are dismissed but, in the facts and circumstances, with no order as to costs.



S. MURALIDHAR, J



RAJIV SHAKDHER, J

DECEMBER 17, 2015

Rk