

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 02.11.2016

Pronounced on : 21.04.2017

Coram:

The Hon'ble Mr.Justice NOOTY. RAMAMOHANA RAO

AND

The Hon'ble Dr. Justice ANITA SUMANTH

TAX CASE (APPEAL) No.770 of 2007

Commissioner of Income Tax,
Chennai

.. Appellant

Versus

Adyar Gate Hotel Ltd.,
132 TTK Raod,
Chennai-18.

..Respondent

Prayer: Tax Case Appeal filed under Section 260A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal, Madras "A" Bench dated 31st May 2006 in ITA.No.1522/Mds/02.

For Appellant .. Ms. Hema Murali Krishnan
Standing Counsel

For Respondent .. Mr.C.Natarajan, Senior Advocate
For Mr.K.Krishnamoorthy

JUDGMENT

(Judgment of this Court was delivered by ANITA SUMANTH, J.)

The assessment year involved is 1998-99. The substantial question of law raised by the Revenue challenging an order of the Income tax Appellate Tribunal (in short 'Tribunal') dated 3.5.2006 and admitted for consideration is as follows:

‘ Whether in the facts and circumstances of the case, the Tribunal was right in holding that deduction under section 80HHD should be given in respect of the Chennai unit without deducting the losses incurred in another unit owned by the assessee?’

2. The assessee/respondent is a company engaged in the business of managing hotels. The assessee, at the relevant point of time, had three properties, one each at Chennai, Ootacamund and Vishakapatnam. The interpretation of Section 80HHD of the Income Tax Act (in short ‘Act’) is called into question this appeal. Section 80HHD, a part of Chapter VIA of the Act, provides for a deduction in respect of earnings in convertible foreign exchange of an Indian Company, resident in India and engaged in the business of a hotel or a tour operator approved by the prescribed authority. The provisions of Section 80HHD in so far as relevant for adjudication of this appeal are extracted below:

‘Deduction in respect of earnings in convertible foreign exchange.

80HHD.(1) *Where an assessee, being an Indian company or a person (other than a company) resident in India, is engaged in the business of a hotel or of a tour operator, approved by the prescribed authority in this behalf or of a travel agent, there shall, in accordance with and subject to the provisions of this section, be allowed, in computing the total income of the assessee, a deduction of a*

sum equal to the aggregate of -

(a) fifty per cent of the profits derived by him from services provided to foreign tourists; and

(b) so much of the amount out of the remaining profits referred to in clause (a) as is debited to the profit and loss account of the previous year in respect of which the deduction is to be allowed and credited to a reserve account to be utilised for the purposes of the business of the assessee in the manner laid down in sub-section (4);”

.....

(2) This section applies only to services provided to foreign tourists the receipts in relation to which are received (in, or brought into, India by the assessee in convertible foreign exchange within a period of six months from the end of the previous year or, (within such further period as the competent authority may allow in this behalf)

(3) For the purposes of sub-section (1), profits derived from services provided to foreign tourists shall be the amount which bears to the profits of the business (as computed under the head “Profits and gains of business or profession) the same proportion as the receipts specified in sub-section (2) ((as reduced by any payment, referred to in sub-section (2A), made by the assessee)) bear to the total receipts of the business carried on by the assessee.’

3. The assessee, in accordance with the provisions of Section 80HHD of the Act, claimed a deduction of the profits earned in convertible foreign exchange in respect of the hotel located at Chennai, approved by the prescribed authority in terms of Rule 18 BBA (5) of the Income tax Rules, the Director General of Tourism, Government of India. There is no dispute with

the position that the property at Chennai was the only eligible property from amongst the three properties managed by the assessee.

4. The computation of relief under Section 80HHD is in terms of the formula set out in sub-section (3) of Section 80HHD. The '*eligible profits*' shall bear the same proportion of '*profits of the business*' as computed under the head profits and gain of business or proportion as the receipts specified in sub-section (2), i.e. '*foreign receipts brought into India in convertible foreign currency*' bears to the '*total receipts of the business carried on by the assessee*'.

5. In terms of the above, the assessee filed a return of income claiming relief under section 80 HHD in the following terms:

CALCULATION OF DEDUCTION U/S 80 HHD

<u>TOTAL SALES (INCLUSIVE OF TAXES)</u>	
TOTAL SALES OF PARK SHERATON HOTEL & TOWERS AS PER PROFIT AND LOSS ACCOUNT	56,29,68,190
<u>LESS:</u>	
DIVIDEND AS PER PROFIT AND LOSS ACCOUNT	51,840

	56,29,16,350
<u>ADD:</u>	
LUXURY TAX	9,26,87,053
SALES TAX	1,22,37,925
EXPENDITURE TAX	5,53,96,060
SERVICE TAX	10,59,714

Total	<u>72,42,97,102</u>

Eligible Deduction:

BUSINESS PROFIT AS PER RETURN	X	FOREIGN EXCHANGE EARNINGS

TOTAL SALES (INCLUSIVE OF TAXES)		

$$\frac{18,03,73,848}{72,42,97,102} \times 36,72,22,408 = 9,14,50,482$$

6. The assessee had adopted a sum of Rs. 18,03,22,408/- being the business profits as per the return of income, a sum of Rs.1,36,72,22,408/- being the actual foreign exchange earnings and a sum of Rs.72,42,97,102/-, being the total sales, all three figures relating to the eligible hotel at Chennai alone, for the computation of relief u/s 80HHD of the Act.

7. While completing the assessment, the assessing officer vide order dated 30.3.2001, re-computed the deduction under section 80HHD of the Act as follows;

Eligible 80 HHD deduction:

Business income x Receipts from services provided to foreign tourists
Total receipts of the business

1. Business income	:	Rs. 7,35,97,733
2. Receipts from services provided to foreign tourists	:	
Shown by the assessee:	:	Rs. 36,72,22,408
Add receipts at Vizag unit	:	Rs. 15,85,961
Total		Rs. 36,88,08,369
3. Total receipts of the business:		
Total receipts as per consolidated P&L a/c.	:	Rs. 57,89,07,406
Add: Taxes as shown by the assessee	:	Rs. 16,13,80,752
Total		Rs. 74,02,88,158
Less:		
Dividend	Rs. 51,840	
Interest(other sources)	Rs.5,00,830	: Rs. 5,52,670
Total		Rs. 73,97,35,488

Eligible deduction: $\frac{7,35,97,733 \times 36,88,08,369}{73,97,35,488}$
= Rs.3,66,93,467

8. The difference in the computation by the department arises on two accounts viz., firstly, '*business profits*' adopted at a figure of Rs.7,35,97,733/- as against Rs.18,03,73,848/- adopted by the assessee, and secondly '*total business of the assessee*' taken at a figure of Rs.73,97,35,488/- as against a figure of Rs.72,42,97,102/-. The difference in business profits arises on account of the assessing officer adopting the net figure of profits after taking into account positive receipts from the eligible hotel at Chennai and loss from the ineligible hotels at Ooty and Vizag. Business profits of Rs.18,03,73,848/- as adopted by the assessee thus stood reduced to Rs.7,35,97,733/-. Then again, total receipts of the business stood increased from Rs.72,42,97,102/- to Rs.73,97,35,488/- on account of adding back of other incomes to the denominator of the formula over and above total sales relatable to the Chennai hotel, adopted by the assessee. The deduction as against the figure of Rs.9,14,50,482/- thus stood reduced to Rs.3,66,93,467/- as per the working of the assessing officer vide order of assessment dated 30.3.2001.

9. It is relevant to note that the assessee, in compliance with the provisions of section 80AB of the Act had restricted its claim of deduction under section 80HHD to a figure of Rs.7,58,38,597/- being the available profits. Section 80AB of Chapter VIA of the Act opens with a non-obstante clause, mandating that the sum total of all deductions claimed under that chapter shall be restricted to the available profits alone thus ensuring that no assessee obtains a benefit in excess of the total profits earned. Thus, though the assessee in this case was entitled to a deduction of an amount of

Rs.9,14,50,482/-, by virtue of the overriding provisions of section 80AB of the Act, the deduction was restricted to a figure of Rs.7,58,38,597/- only.

10. In first appeal against the order of assessment, the Commissioner of Income Tax (Appeals) vide order dated 10.6.2002, dismissed the ground of appeal relating to computation of deduction u/s 80HHD. The aforesaid order was reversed in second appeal by the Income Tax Appellate Tribunal, vide order dated 31.5.2006 assailed in appeal before us.

11. We have heard the submissions of Ms.Hema Murali, learned counsel appearing for the Commissioner of Income Tax and Mr.C.Natarajan, Senior Advocate appearing for Mr.K.Krsihnamoorthy on behalf of the Assessee/Respondent.

12. This appeal calls upon us to decide the nature of '*business profits*' and '*total receipts*' for the purpose of computation u/s 80HHD of the Act and whether the computation of deduction should take into account the gains/losses of ineligible entities as well.

13. Section 80HHD of the Act has been inserted with effect from 1.4.2009 to provide a fillip to the hotel industry and as a measure to augment foreign exchange resources. In the words of the Union Finance Minister in his speech on 22.02.89, Section 80HHD was introduced for the following purpose:-

'In order to provide encouragement to tourism for augmenting foreign exchange reserves, it is proposed to provide deduction of 50 per cent of exchange earnings derived from services rendered to foreign tourists by approved hotels or travel agents. The remaining 50% will also receive similar exemption if it is credited to reserve fund and

utilized for the purpose of business of the assessed on the fulfillment of certain conditions. Further, in order that the 100 percent exemption of foreign exchange earnings provided to exporters, approved hotels, travel agents, etc. is not subjected to the levy of minimum tax on companies, it is proposed to exclude such profits from tax liability under Section 115J.'

There is thus no quarrel with the position that section 80HHD provides a tax concession and has been specifically brought in to serve a beneficial purpose. The provision contains two prescriptions, firstly, as regards the 'activity' to be carried on and secondly as regards the 'entity' engaged in carrying on the eligible activity. It is only upon satisfaction of the aforesaid two prescriptions that an assessee becomes entitled to the relief set out thereunder.

14. A self contained code, checks and balances are in-built to ensure proper computation of relief in accordance with the object and purpose of its insertion. A quick summary would reveal the scheme thus: The provisions of sub-section (1) set out the relevant framework for establishing the entitlement of an assessee. It provides for an apportionment of relief by way of an absolute deduction of 50 percent of the profits and the balance of 50% to be deposited in a reserve account to be specifically utilized for construction of a newly approved hotel or expansion of facilities in existing hotels, provision of facilities for the growth of Indian Tourism as may be notified or other specified purposes as set out in terms of sub-section (4) of Section 80HHD within a period of 5 years, next following the previous year in which the amount was

credited. Sub-section (5) ensures that if the amount credited in the reserve account is utilized for any other activity other than that mentioned in sub-section (4) it shall be charged to tax accordingly and the benefit of deduction under section 80HHD lost.

15. Sub-section (2) states that the benefit is available only in respect of services provided to foreign tourists in consideration of which receipts are brought into India in convertible foreign exchange within the stipulated period of six months from the end of the previous year or such extended time as may be granted by the competent authority. Explanation 1 to sub-section (2) extends the benefit of section 80HHD to payments received in Indian currency from a tourist group obtained by way of conversion of foreign exchange upon production of a certificate obtained in the prescribed form confirming such transaction. Sub-section (3) opens with the phrase '*for the purposes of sub-section 1*' and sets out the formula for the claim of the deduction as follows:

$$\frac{\text{Business profits} \times \text{Eligible receipts}}{\text{Total receipts}}$$

16. Sub-section (6) mandates that the return is to be accompanied by a certificate of a chartered accountant in respect of the claim under section 80HHD. Sub-section (7) casts a further restriction to state that where a deduction is claimed and allowed in terms of sub-section (1), such profit shall not qualify for any other deduction under part 'C' of chapter VIA and in any

event, shall not exceed the profits and gains of such hotel. This ensures that the provisions of section 80AB are specifically reiterated in the computation of deduction under section 80HHD.

17. The issue occupying our attention has to be resolved in the light of the scheme of the section and the intention behind its insertion. We are of the view that full benefit of the provision should be extended to an eligible assessee without there being an attempt to whittle down the same. It is important to note that sub-section (3) has to be read along with sub-section (1) by statutory prescription and in such an event, all parameters of the formula should relate solely to the receipts/profits/income of the eligible unit alone and none other.

18. Our attention is drawn by Ms.Hema Murali to the decision of the Karnataka High Court in the case of *Commissioner of Income Tax and another Vs. ITC Hotels Ltd.*, (344 ITR 680). We do not believe that this decision advances the case of the Revenue. As seen from the discussion extracted below, a unit wise computation in terms of section 80HHD should be effected with all eligible units taken as a whole and not bifurcated:

'The submission on behalf of the assessee that the profits unit-wise should be ascertained first in respect of all recognized or certified units and the proportionate profits of the foreign exchange receipts should be arrived at by keeping that as a base and determine the admissible benefit for sub-section (1) of section 80HHD of the Act in respect of each unit and add up the figure for arriving at the overall benefit under section 80HHD of the Act is not an acceptable argument for the reason that the scheme of the Act does not provide for assessment of the income of the individual units of the assessee and even in terms of the particulars furnished in the prescribed Form 10CCAD the assessee itself has furnished figures

treating all units as one for the purpose of computation of total income, etc., which is the proper method even as envisaged under the scheme of the Income-tax Act, particularly, for arriving at the total income of the assessee after arriving at the income under the respective heads and as we are in this case concerned only with the income under the head "Profits and gains of business or profession", we do not think it is possible to accept the contention that the unit-wise profit should be ascertained first and proportionate profit of the unit attributable to the foreign exchange should be ascertained thereafter by applying the formula and thereafter on the basis of the profits of all units, to arrive at the total benefit of profit is prudent method of working out the profits for the purpose of computation under section 80HHD of the Act.

We are of the clear view that overall profits, of the assessee, computation of which is provided in sub-Chapter (D) of Chapter IV of the Act is only one of computing the total income of the assessee under this head as a whole and as one unit and not on any unit-wise, method, etc.

Even in section 80HHD of the Act the reference is to the business of the assessee which is the business as a whole and as one unit and not by sub-dividing the total income of the business into unit-wise total income and then arriving at the unit-wise overall profit proportionate profit and then adding up the same for arriving at the benefit under section 80HHD of the Act. In our view, that is neither envisaged under the statutory scheme or as is indicated in the language of the section. It is, therefore, question No.4 is also answered in the negative against the assessee and in favour of the Revenue.'

19. The above conclusion would rather support the stand of the assessee that the deduction should be granted qua eligible unit/units only and not aggregating the profits/losses of eligible and ineligible units. In the present case, the admitted position is that it is only the Chennai unit which has an approval from the Director General, Tourism and is thus an eligible unit.

20. The three components set out in sub-section (3) of the section 80HHD are (i) profits of the business (ii) receipts specified in sub-section (2) and iii) total receipts of the business, all of which have to be seen in the context of sub section (1) in as much as sub-section (3) commences with the phrase '*for the purpose of sub-section (1)*'. The Revenue would also seek to draw a parallel with the provisions of Section 80HHC of the Act dealing with deduction in the case of profits derived from exports. We do not believe that the two provisions are analogous for the simple reason that the 'Explanation' in the provision defines the individual components of the formula. Thus, while both section 80HHC and 80HHD contain Explanations defining terms used in the provision, 'Export Turnover', 'Total Turnover' and 'profits of the business' have been specifically defined for the purposes of the interpretation of section 80HHC. The absence of a statutory definition for the components of the formula prescribed under section 80HHD would support the conclusion that the computation be confined to the eligible unit alone without introduction of an artificial restriction such that full play is given to the benefit thereunder. In conclusion each provision in Chapter VI A is intended to be a self-contained code subject to the provisions of Section 80A to 80B and where references are to be drawn from other provisions within the chapter, Legislature has specifically provided for the same. Section 80HHD, with which we are concerned, has thus to be interpreted solely on its language and bearing in mind the spirit and intention with which it was inserted.

21. In the light of the discussion above, the question of law is answered in favour of the assessee and against the Revenue. The

departmental tax case appeal stands rejected with no order as to costs.

[N.R.R.,J.] & [A.S.M.,J.]

21.04.2017

Index: Yes/No
Internet:Yes/No
Msr

NOOTY. RAMAMOHANA RAO, J

AND

Dr.ANITA SUMANTH,J

msr

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