IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

ITA No. 975 of 2008 (O&M)
Date of decision: 2.5.2017

Nexo Industries Private Limited

……Appellant

Vs.

Commissioner of Income Tax, Ludhiana

…..Respondent

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

Present: Mr. S.K. Mukhi, Advocate with Mr. Jaswinder Singh, Advocate for the appellant.

Mr. Z.S. Klar, Senior Standing counsel for the respondent.

Ajay Kumar Mittal,J.

1. The appellant-assessee has filed the instant appeal under Section 260A of the Income Tax Act, 1961 (in short, "the Act") against the order dated 2.1.2008, Annexure A.3, passed by the Income Tax Appellate Tribunal, Chandigarh Bench 'A', Chandigarh (in short, "the Tribunal") in ITA No.100/CHANDI/2017 and ITA No.142/CHANDI/2007, for the assessment year 2003-04, claiming following substantial questions of law:-

> "I. Whether excise duty rebate/refund, which is given under the Central Excise Act is not an export incentive as it is not given under any Export Promotion Scheme of the Government?

> II. Whether on the true and correct interpretation of the provision of Section 80HHC the claim be declined in pursuance to retrospective amendment in the Act relatable to option to be made amongst duty draw back and DEPB after the conclusion of an event?
>
> III. Whether on the true and correct interpretation of the provision of Section 80IB, the claim of excise Duty rebate/refund, which is given under the Central Excise Act and not under any Export Promotion Scheme, is an eligible claim?"

2. A few facts relevant for the decision of the controversy involved as narrated in the appeal may be noticed. The assessee is engaged in the business of manufacturing of fasteners and exporting goods. It filed its return of income on 30.11.2003 at an amount of ₹ 3,55,62,970/- alongwith audited financial statements under Section 44AB of the Act. The case was taken up for scrutiny. After examining the matter, the income of the assessee was assessed at ₹ 5,09,19,102/- vide order dated 24.2.2006, Annexure A.1. Aggrieved by the order, the assessee filed appeal before the Commissioner of Income Tax (Appeals) [CIT(A)]. Vide order dated 12.10.2006, Annexure A.2, the appeal was partly allowed. Not satisfied with the order, both the assessee and the revenue filed appeals before the Tribunal. Vide order dated 2.1.2008, Annexure A.3, the Tribunal dismissed both the appeals. Hence the instant appeal by the appellant-assessee.

3. We have heard learned counsel for the parties.

4. It was not disputed by learned counsel for the parties that in view of the order of even date passed in ITA No.271 of 2010 (***Nexo Industries Private Limited Vs. Commissioner of Income Tax,***

Ludhiana) relating to claim for deduction under Section 80IB of the Act in respect of refund of excise duty where the matter has been remanded to the Assessing Officer to readjudicate after affording opportunity of hearing to the assessee, the issue in the present case relating to deduction under Section 80IB of the Act is to be sent back for fresh decision in accordance with law. Ordered accordingly.

5. Adverting to deduction under Section 80HHC of the Act, it may be noticed that the Assessing Officer while relying upon amendment by Taxation Laws (Second Amendment) Act, 2006 with retrospective effect had held that the assessee was not entitled for deduction under Section 80HHC of the Act as claimed. In view of amended provisions of Section 80HHC and insertion of clause (iiid) and (iiie) to Section 28 of the Act as amended by the Taxation Laws (Amendment) Act, 2005, the assessee had to justify its claim in view of provisions of Section 28(iiid) and to prove that it had necessary and sufficient evidence to establish that it had option to choose either the duty draw back or duty entitlement passbook scheme being the Duty Remission Scheme and that the rate of draw back credit attributable to the customs duty was higher than the credit allowable under the Duty entitlement Pass Book Scheme being the duty Remission Scheme. Insertion of conditions in the third and fourth provisos to Section 80HHC by Taxation Laws (Second Amendment) Act, 2005 with retrospective effect was challenged before this Court in ***Guru Nanak Exports, Phagwara vs. Assistant Commissioner of Income Tax, Jalandhar***, CWP No.11328 of 2009 decided on 3.10.2012. It was held that the amendment was prospective and was invalid to the extent of being made retrospective. The Supreme Court considering the similar

issue regarding constitutional validity of the provisions held the same to be prospective in nature in ***Commissioner of Income Tax and another vs. Avani Exports and others,*** (2015) 119 DTR Judgments 352. In the present case, the Tribunal also had declined the claim of the assessee under Section 80HHC of the Act by taking into consideration the amended provisions which have been held to be prospective. The relevant findings recorded by the Tribunal in this regard read thus:-

> "We have given our careful consideration to the rival contentions. In our considered view, the claim of the assessee has been disallowed by the Assessing Officer for want of evidence. The Assessing Officer has decided this issue vide Paras 3.6 to 3.6.3. The Assessing Officer has referred to the amended provisions of Section 80HHC and insertion of clause (iiid) and (iiie) to Section 28 of the Income Tax Act 1961 as amended by the Taxation Laws (Amendment) Act, 2005. In para 3.6.3, the Assessing Officer has recorded a finding of fact that the assessee has failed to bring the necessary evidence on record for justification of its claim into account the increase of 90% of export incentive on account of Excise Duty Rebate/Refund for the purpose of calculation of deduction under Section 80HHC. The Commissioner of Income Tax(A) has also confirmed the view of the Assessing Officer vide para 5.4 of his order."

6. In view of the above, it is considered appropriate that the matter is referred back to the Assessing Officer for examining the matter afresh in respect of claim under Section 80HHC of the Act as well. Accordingly both the issues relating to deduction under Section 80HHC and also under Section 80IB of the Act shall be readjudicated by the Assessing Officer keeping in view the latest case law on the point after

hearing the assessee by passing a speaking order in accordance with law.

The appeal stands disposed of in the manner indicated hereinbefore.

(Ajay Kumar Mittal)
Judge

May 02, 2017 **(Ramendra Jain)**
'gs' **Judge**

Whether speaking/reasoned **Yes**
Whether reportable **Yes**