IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 19.03.2019

CORAM

THE HON'BLE DR.JUSTICE VINEET KOTHARI
AND
THE HON'BLE MR.JUSTICE C.V.KARTHIKEYAN

Tax Case Nos.253 to 264 of 2008

M/s.Sri Aurobindo Ashram Harpagaon
Workshop Trust,
(Now known as
Sri Aurobindo Udyog Trust), Pondicherry
.. Appellant in All TCA

Vs.

The Deputy Commissioner of Income Tax
Circle-I, Pondichery 625 003 &
The Jt. CIT Spl.Rg.V,
Chennai 600 034. .. Respondent in All TCA

Prayer:-

Tax Case Appeals filed under Section 260A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal, Madras 'B' Bench, Chennai, dated 2.2.2005 made in ITA Nos.1977/Mds/98, 1327/Mds/97, C.O.No.33/Mds/2000 in ITA No.284/Mds/2000, C.O.No.36/Mds/2000 in ITA No.516/Mds/2000, ITA Nos.516/Mds/2000, 284/Mds/2000, C.O.No.82/Mds/2003 in ITA No.623/Mds/2003, C.O.No.83/Mds/2003 in ITA No.626/Mds/2003, I.T.A.Nos.623/Mds/2003, 625/Mds/2003, 626/Mds/2003 and 629/Mds/2003.

against the Order of the Commissioner of Income Tax (Appeals) VIII, made in Appeal No.24 and 25/2001-2002 and Appeal No.331/2002-2003, dated 03.01.2003, ITA.No.330/2002-2003 dated 28.01.2003 and the Order of the Commissioner of Income Tax (Appeals), made in ITA.No.202/98-99, dated 16.11.1998, ITA.No.38/97-98, dated 31.08.1998 and the Order of Commissioner of Income Tax (Appeals)III, made in ITA.No.365/98-99/A.III, dated 07.01.2000, ITA.No.38/1998-99 dated 21.12.1998, ITA.No.11/97-98/A.III dated 15.11.1999, ITA.No.22/97-98 dated 31.08.1998 and ITA.No.23/1996-97, dated 18.03.1997 and against the Order of the Deputy/Joint Commissioner of Income Tax, Circle I, Pondicherry made in PA.No.G.I.No.645-S, G.I.No.606-A, Dated 27.03.2002, 28.02.2000, 24.03.2000, 09.07.1998, 28.12.1998, 17.03.1998, 14.02.1997, 27.03.2002, 21.03.1996 for the Assessment Years 1993-1994 to 1999-2000.

For Appellant : Mr.R.Vijayaraghavan for M/s.Subbaraya Aiyar Padmanabhan

For Respondent : Mr.J.Narayanaswamy Senior Standing Counsel

COMMON JUDGMENT
(Delivered by DR.VINEET KOTHARI,J)

The Assessee has filed these Appeals under Section 260A of the Act raising the following purported substantial questions of law arising from the order of the learned Income Tax Appellate Tribunal dated 2.2.2005 partly allowing the Revenue's Appeals and dismissing the Cross Objections filed by the Assessee and they were admitted by a co-ordinate Bench of this court on 27.8.2008 by framing the the following questions of law:-

> "i) Whether the Tribunal is right in holding that the turnover of all the units of the Appellant business would be taken into account in determining the deduction under Section 80 HHC and not the turnover of the only export unit to be taken into consideration?
>
> ii) Whether the Tribunal is right in holding that first expenditure under Section 35(I)(ii) is to be charged from the profits and then only deduction under Section 80 HHC of the Act is to be computed?"

2. The relevant portion of the order passed by the Tribunal is quoted below for ready reference:-

> "8. We have heard the rival submissions and gone through the case records and the provisions of Section 80HHC and Section 80AB of the Act. We reproduce the provisions of Section 80HHC(3)(a) and Section 80AB as under:-
>
> > "80HHC(3) For the purposes of sub-section (1),-
> > (a) where the export out of India is of goods or merchandise manufactured (or processed) by the assessee, the profits derived from such export shall be the

amount which bears to the profits of the business, the same proportion as the export turnover in respect of such goods bears to the total turnover of the business carried on by the assessee;

80AB: Where any deduction is required to be made or allowed under any section (***) included in this Chapter under the heading "C.-Deductions in respect of certain incomes" in respect of an income of the nature specified in that section which is included in the gross total income of the assessee, then, notwithstanding anything contained in that section, for the purpose of computing the deduction under that section, the amount of income of that nature as computed in accordance with the provisions of this Act (before making any deduction under this Chapter) shall alone be deemed to be the amount of income of that nature which is derived or received by the assessee and which is included in his gross total income."

During the course of hearing, the Bench has referred the decision of the Hon'ble Apex Court in the case of Ipca Laboratory Ltd. v. DCIT (2004) 266 ITR 521(SC). The learned counsel for the assessee stated that the ratio of the decision of the Hon'ble Supreme Court (supra) is not applicable to the present case. The Hon'ble Apex Court has held as under:-

"We are unable to accept the submission of Mr.Dastur. Undoubtedly section 80HHC has been incorporated with a view to providing incentive to export houses. Even though a liberal interpretation has to be given to such a provision the interpretation has to be as per the wording of this section. If the wordings of the section are clear then benefits, which are not available under the section, cannot be conferred by ignoring or misinterpreting words in this section. In this case we are concerned with the wordings of sub-section (3)(c) of section 80HHC. As noted earlier sub-section (3)(a) deals with the case where the export is only of self manufactured goods. Sub-section 3(b) deals with the case where the export is only of trading goods. Thus when the Legislature wanted to take exports from self manufactured goods or trading goods separately, it has already so provided in sub-sections (3)(a) and (3)(b). It would not be denied that the word 'profit' in section 80HHC(1) and sections 80HHC(3)(a) and (3)(b) means a positive profit. In other words if there is a loss then no deduction would be available under section 80HHC(1) or (3)(a) or (3)(b). In arriving at the figure of positive profit, both the profits and the losses will have to be considered. If the net figure is a positive profit then the assessee will be entitled to a deduction. If the net figure is a loss then the assessee will not be entitled to a deduction. Sub-section (3)(c) deals with cases where the export is of both self manufactured goods as well as trading goods. The opening part of sub-section (3)(c) states "profits derived from such export shall". Then follow (i) and (ii) the word "and" appears. A plain reading of sub-section (3)(c) shows that "profits from such exports" has to be profits of exports of self manufactured goods plus profits of exports of trading goods. The profit is to be calculated in the manner laid down in sub-sections (3)(c)(i) and (ii). The opening works "profit derived from such exports" together with the word "and" clearly indicate that the profits have to be calculated by counting both the exports. It is clear from a reading of section (1) of section 80HC(3) that a deduction can be permitted only if there is a positive profit in the exports of both self manufacture goods as well as trading goods. If there is a loss in either of the two then that loss has to be taken into account for the purposes of computing profits."

Under section 80HHC(1), the deduction is to be given in computing the total income of the assessee. In computing the total income of the assessee both profits as well as losses will have to be taken into consideration. Section 80AB is relevant. It reads as follows:

80AB: Where any deduction is required to be made or allowed under any section included in this Chapter under the heading "C-Deductions in respect of certain incomes" in respect of an income of the nature specified in that section which is included in the gross total income of the assessee, then, notwithstanding anything contained in that section, for the purpose of computing the deduction under that section, the amount of income of that nature as computed in accordance with the provisions of this Act (before making any deduction under this Chapter) shall alone be deemed to be the amount of income of that nature which is derived or received by the assessee and which is included in his gross total income."

Section 80B(5) is also relevant. Section 80B (5) provides that "gross total income" means the total income computed in accordance with the provisions of the Income-tax Act.

Section 80AB is also in Chapter VI-A. It starts with the words "where any deduction is required to be made or allowed under any section of this Chapter". This would include section 80HHC. Section 80AB further provides that "notwithstanding anything contained in that section". Thus section 80AB has been given an overriding effect over all other sections in Chapter VI-A. Section 80HHC does not provide that its provisions are to prevail over section 80AB or over any other provisions of the Act. Section 80HHC would thus be governed by section 80AB. The decisions of the Bombay High Court and the Kerala High Court to the contrary cannot be said to be the correct law. Section 80AB makes it clear that the computation of income has to be in accordance with the provisions of the Act. If the income has to be computed in accordance with the provisions of the Act, then not only profits but also losses have to be taken into consideration."

We need not deliberate this issue as the Hon'ble Supreme Court has already decided the issue and held that the incomes or losses of all the units of the assessee's business will be clubbed together and taken together in view of the provisions of section 80HHC(3)(a) and 80AB of the Act and accordingly deduction under section 80HHC will be provided. In view of this, we have no hesitation in deciding this issue against the assessee by following the decision of the Hon'ble Supreme Court cited supra. Accordingly, this issue is decided against the assessee and in favour of the Revenue....

11. We have heard the rival submissions and perused the case records. It is seen that the donation made by the assessee as claimed by it, is an expenditure on scientific research and it should have been allowed while comparing the income from the business. The assessee has claimed that first, deduction under section 80HHC should have allowed and then, the expenditure under section 35(I)(ii) has to be charged. The C.I.T.(Appeals) has given a finding that this expenditure could not apportioned to various units of business of the assessee. According to him, this expenditure has been incurred out of the income that has been earned by the various units and therefore, it should be apportioned on the basis of the profits of the various units earned during the years as reflected in the individual profits and loss account of the units. In the Income-tax Act, the deductions under Chapter VIA has to be computed and section 80AB of the Act provides that as to how it is to be computed in accordance with the provisions of this Act and that income alone shall be deemed to be the amount of income of that nature which is received by the assessee which is to be included in its gross total income. In view of the provisions of section 80AB, we feel that first the expenditure under section 35(I)(ii) is to be charged and then deduction under section 80HHC of the Act is to be allowed. Therefore, we have no hesitation in upholding the action of the Assessing Officer and decide the issue against the assessee.

3. Learned counsel for the Assessee, Mr.Vijayaraghavan has submitted before us that the benefit of deduction under Section 80HHC of the Act ought to have been allowed to the Assessee by the Authorities below taking only the Export Turnover of the 4 Units which export its products and the total turnover of those 4 Units only could have been taken as total turnover for the purpose of computing deduction under Section 80HHC of the Act. He further submitted that even though the Assessee has various Units about 10 and within which only 4 Units manufacture goods and export the same and the remaining Units are making the domestic sales only, the turnover for the purpose of Section 80HHC should be computed only based on the Export Turnover of the 4 units separately for export units. The other contention raised by the learned counsel for the Assessee was that one of the Units of the Assessee was engaged in the business of selling fuel as Agent for the Government Oil Company and earned only 'commission' income and therefore, such income should be excluded from the definition of 'Turnover' while computing deduction under Section 80HHC of the Act.

4. He further submitted with regard to the issue of Section 35(I)(ii) of the Act that the expenditure was incurred by the Assessee in the form of Donations made to Aurobindo Ashram. which is engaged in the business of Scientific Research and was duly approved for the said purpose and therefore, such an expenditure should be taken as 'Donation' covered by the scope of Section 80GGA of the Act and therefore, it cannot be deducted from the business profits while computing deduction under Section 80HHC of the Act.

5. On the other hand, the learned counsel for the Respondent/Revenue Mr.J.Narayanaswamy supported the impugned order of the learned Tribunal and urged that deduction under Section 80HHC has to be computed in cases of Assessee having composite Units where some of which are engaged in exporting goods as per the formula given in sub- section (3) of Section 80HHC of the Act which is very clear in its terms of Export Profits earned by the Assessee. Therefore, the deduction could be arrived at by dividing Export Turnover by the Total Turnover of the Assessee, and only such proportion of Export Profit will be eligible for deduction under Section 80HHC of the Act.

6. The issue on commission business from the sale of the fuel or oil on behalf of the Government Oil Marketing Company, the learned Senior Standing Counsel submitted that such issue was not raised before the Authorities below and therefore, cannot be permitted to be raised before this court for the first time under Section 260A of the Act. On the other hand, the second question for allowing deduction under section 35(I)(ii) of the Act he submitted that the Assessee has claimed itself the

said Expenditure as Expenditure on Scientific Research by way of payment made to the approved institution and therefore, the same also cannot be treated as donation under Section 80GGA of the Act as claimed by the Assessee.

7. Having heard the learned counsel for the Appellant, we are of the considered opinion that both the questions framed for consideration deserve to be answered against the Assessee and in favour of the Revenue and the Appeals filed by the Assessee deserve to be dismissed. The reasons are as follows:-

8. Firstly, as far as the computation of Export Profits of each unit basis is concerned, there is no scope for computation of Export Profit and Export Turnover separately for each Unit whereas the cases of composite units carried on by the Assessee is clearly covered by Sub-Section (3) of Section 80HHC of the Act. The said provision is quoted below for ready reference:-

> " (3) For the purposes of sub-section (1),-
> (a) where the export out of India is of goods or merchandise manufactured or processed by the assessee, the profits derived from such export shall be the amount which bears to the profits of the business, the same proportion as the export turnover in respect of such goods bears to the total turnover of the business carried on by the assessee;
>
> (b) where the export out of India is of trading goods, the profits derived from such export shall be the export turnover in respect of such trading goods as reduced by the direct costs and indirect costs attributable to such export;"

9. The provisions of Explanation (baa) to Section 80 HHC are also quoted below for ready reference:-

> "(baa) "profits of the business" means the profits of the business as computed under the head "Profits and gains of business or profession" as reduced by--
>
> (1) ninety per cent of any sum referred to in clauses (iiia), (iiib), (iiic), (iiid) and (iiie) of section 28 or of any receipts by way of brokerage, commission, interest, rent, charges or any other receipt of a similar nature included in such profits; and

(2) the profits of any branch, office, warehouse or any other establishment of the assessee situate outside India;"

10. In view of the aforesaid clear position of law as held by Hon'ble Supreme Court in IPCA Laboratory case (supra), we are of the view that the Total Turnover of the business carried on by the Assessee has to be placed in the denominator in the formula given in sub-section (3) of Section 80HHC quoted above and there is no question of treating the Export Profit from the Export Units as separate units of the Assessee for the purpose of computing the benefit of deduction under sub-Section (3) of Section 80HHC of the Act. The very purpose of reducing the 'Export Profit' proportionately which may be from one or four units as in the present case is to give the average effect by arriving at the 'Export Turnover' as divided by the 'Total Turnover' of the Assessee of the Assessee during the year. Therefore, the entire Turnover of the business of the Assessee including the Export Turnover of the Appellant has to be included in the denominator of the formula stipulated in sub-section (3) of Section 80HHC of the Act viz., Export Profit x Export Turnover (of all Export Units)/Total Turnover (of Entire Business of Assessee including Export and other Turnover).

11. The contention of the learned counsel for the Assessee that in view of the judgment of Hon'ble Supreme Court in CIT v. Lakshmi Machine Works ((2007) 290 ITR 667 (SC)), the receipts, which do not partake the character of turnover, have to be excluded from the computation of turnover, is misconceived. The said observation of Hon'ble Supreme Court in the case of Lakshmi Machine Works (supra) was made in the context of Explanation (baa) and in that context, the Hon'ble Supreme Court held that the receipts like Excise Duty and Sales Tax, which are Indirect Taxes and do not have any relevance with the export of goods, have to be excluded from the computation of Total Turnover and that decision cannot be applied in the present case. The relevant observation of the Hon'ble Supreme Court in Lakshmi Machine Works (supra) is quoted below for ready reference:-

> "In the case of combined business of an assessee having export business and domestic business the legislature intended to have a formula to ascertain export profits by apportioning the total business profits on the basis of turnovers. Apportionment of profits on the basis of turnover was accepted as a method of arriving at export profits. This

method earlier existed under Excess Profits Tax Act, it existed in the Business Profits Tax Act. Therefore, just as commission received by an assessee is relatable to exports and yet it cannot form part of "turnover", excise duty and sales tax also cannot form part of the "turnover". Similarly, "interest" emanates from exports and yet "interest" does not involve an element of turnover. The object of the legislature in enacting Section 80HHC of the Act was to confer a benefit on profits accruing with reference to export turnover. Therefore, "turnover" was the requirement. Commission, rent, interest etc. did not involve any turnover. Therefore, 90 per cent of such commission, interest etc. was excluded from the profits derived from the export. Therefore, even without the clarification such items did not form part of the formula in Section 80HHC (3) for the simple reason that it did not emanate from the "export turnover", much less any turnover. Even if the assessee was an exclusive dealer in exports, the said commission was not includible as it did not spring from the "turnover". Just as interest, commission etc. did not emanate from the "turnover", so also excise duty and sales tax did not emanate from such turnover.Since excise duty and sales tax did not involve any such turnover, such taxes had to be excluded. Commission, interest, rent etc. do yield profits, but they do not partake of the character of turnover and, therefore, they were not includible in the "total turnover". The above discussion shows that income from rent, commission etc. cannot be considered as part of business profits and, therefore, they cannot be held as part of the turnover also. In fact, in Civil Appeal No.4409 of 2005, the above proposition has been accepted by the A.O. [See: page No.24 of the paper book], if so, then excise duty and sales tax also cannot form part of the "total turnover" under Section 80HHC(3), otherwise the formula becomes unworkable. In our view, sales tax and excise duty also do not have any element of "turnover" which is the position even in the case of rent, commission, interest etc. It is important to bear in mind that excise duty and sales tax are indirect taxes. They are recovered by the assessee on behalf of the Government. Therefore, if they are made relatable to exports, the formula under Section 80HHC would become unworkable. The view which we have taken is in the light of amendments made to Section 80HHC from time to time."

12. These observations, with great respect, cannot help the case of the Assessee to support his contention that the Turnover of the Assessee should be restricted to the Turnover of the Units engaged for export only. The contention that the Commission income from the sale of fuel at the Fuel Station in one of the units of the Assessee has to be excluded from the ambit and scope of Turnover cannot be accepted since the said issue has not been raised before the Authorities below and therefore, we cannot permit the same to be raised for the first time in the present Appeals under Section 260A of the Act as it does not arise from the order of the Tribunal. Accordingly, the question NO.1 framed above deserves to be answered against the Assessee and in favour of the Revenue. We hereby do so.

13. As far as the second question is concerned also, we do not find any merit in the contention raised on behalf of the learned counsel for the Assessee so long as the Assessee carries on business and has business profits as declared by him and the expenditure incurred by way of contribution made to some approved institution for Scientific Research is concerned, the Assessee cannot claim it as a donation covered by the provisions of Section 80GGA of the Act so as to take it out from the scope of computation of business profits under Chapter IV Part D within which Section 35 (I)(ii) also is included.

14. The object of raising such a contention before us appears to be to take some expenditure to be treated as donation so as to take it within the scope of Chapter VI-A which. provides for deduction from the Gross Total Income, so that a higher profit can be treated as eligible for deduction under Section 80HHC of the Act. The said change of stand by the Assessee, particularly when the said Expenditure by way of contribution made to the approved Scientific institution has been claimed by the Assessee as business expenditure only, cannot be permitted. Therefore, the second question also deserves to be answered against the Assessee and in favour of the Revenue by holding that the Assessee is not entitled to claim expenditure incurred under Section 35(I)(ii) of the Act as donation under Section 80GGA of the Act so as to exclude it from the amount eligible for deduction under Section 80HHC of the Act.

Accordingly, the Appeals of the Assessee are liable to be dismissed and the same are dismissed. No order as to costs.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

ssk.

To

1. The Deputy Commissioner of
   Income Tax,
   Circle-I, Pondichery 625 003 &
   The Jt. CIT SpI.Rg.V,
   Chennai 600 034.

2. Income Tax Appellate Triburial,
   Madras IB' Bench, Chennai.

3. The Commissioner of Income Tax(Appeals) VIII,
   121, Mahatma Gandhi Road,
   Chennai-600 034.

4. The Joint Commissioner of Income Tax,
   Special Range V, Chennai-34.

+12ccs to Mr.J.Narayanaswamy, Advocate, S.R.Nos.25923 to 25934
+1cc to M/s.Subbaraya Aiyar Padmanabhan, Advocate, S.R.No.26344

Tax Case Nos.253 to 264 of 2008

AK(CO)
CS/05/08/2019