IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO.1173 OF 2017

Pr. Commissioner of Income Tax – 21 ….Appellant

V/s.

M/s. Looms India ….Respondent

Mr. Suresh Kumar for appellant.
Mr. M. Subramanian i/b. Mr. Vishnu S. Hadade for respondent.

CORAM : K.R.SHRIRAM, &
AMIT B. BORKAR, JJ.
DATED : 11th OCTOBER 2021

P.C.:

1 Respondent filed its return of income on 30th October 2001 declaring total income of Rs.Nil and declaring 20% of amount of deduction of Rs.22,33,208/- under Section 80HHC (*Deduction in respect of profits retained for export business*) of the Income Tax Act, 1961 (the said Act). The assessment was completed vide order dated 31st March 2004. The Assessing Officer had held that the assessee had no positive income from the export if 90% of incentives and other income are reduced from profit of the business and disallowed the deduction claimed by the assesee under Section 80HHC. The Assessing Officer also disallowed a sum of Rs.2,39,57,005/- and brought to tax the said amount under Section 69A (*Unexplained money, etc.*) after giving a finding that respondent has not been able to satisfactorily explain the acquisition/purchase of goods of this value. According to the Assessing Officer, the purchase has been made

against cash but full cash payment has not been made on or before the purchase and therefore, it has to be presumed that cash payment shown in the books after the date of purchase did not reflect the true state of affairs. The Assessing Officer also observed that the assessee has not debited any brokerage or commission expenses to the P and L account. He also observed that the amount of cash withdrawn for payments to suppliers on or before the date of purchase is less compared to the value of the cash purchases and cash payments made after the date of purchase to such suppliers and hence cannot be accepted. The whole basis of the Assessing Officer's assumption is that normally in cash purchases the goods are supplied or delivered on receipt of the payment.

2 Aggrieved by this order of the Assessing Officer, respondent filed an appeal before Commissioner of Income Tax (Appeal) [CIT (A)]. The CIT (A) vide order dated 10th November 2004 partly allowed the appeal of the assessee. Being aggrieved by the order of CIT (A), appellant filed an appeal before the Income Tax Appellate Tribunal (ITAT). ITAT vide its order dated 20th July 2016 dismissed the appeal and confirmed the views expressed by CIT (A). CIT (A) had held that respondent was eligible for deduction under Section 80HHC and addition under Section 69A was without any basis. Against the order of ITAT, the present appeal has been filed and the substantial question of law proposed are as under :

(i) Whether on the facts and circumstances of the case, the

Hon'ble Tribunal is correct in holding that the assessee is entitled to compute income u/s. 80HHC on netting of interest income.

(ii) Whether on the facts and circumstances of the case, when the export income is Nil then whether the assessee is entitled to claim deduction u/s. 80HHC on export incentive.

(iii) Whether, on the facts and circumstances of the case and in law, the Hon'ble ITAT has not erred in confirming the order of the Ld. CIT (A) wherein it was held that the assessee is liable for disallowance u/s. 40A(3) of the IT Act instead of addition u/s. 69A made by the AO ignoring the fact that the addition of Rs.2,37,57,005/- was made u/s. 69A which is stand alone addition having no connection with the allowance or other wise of deduction u/s. 80HHC of the Act.

3 At the outset, Mr. Suresh Kumar stated that question no.1 is no more *res-integra* in view of the judgment of the Apex Court in the case of ***ACG Associates Capsules (P.) Ltd. V/s. Commissioner of Income Tax, Central- IV, Mumbai***[1].

4 As regards question no.2, this also is no more an issue. This is because the Assessing Officer had proceeded on the basis that if the report incentives are excluded, there is a negative profit, which in other words means loss, respondent has not derived any profits from the export business and therefore, was not entitled to deduction under Section 80HHC. In paragraph 7 of the Assessing Officer's order, he states "*in the instant case, therefore, the assessee was entitled to deduction only to the extent of profits derived from the export of goods or merchandise which in the assessee's case was a negative figure and as such the assessee was not*

1. (2012) 18 taxmann.com 137 (SC)

entitled to deduction under Section 80HHC.". ITAT, which confirmed the order of CIT (A), has concluded, in fact there would be profits of business in the sum of Rs.16,610/-.

We have to also note that the Assessing Officer had passed this order on 31st March 2004. The CIT (A) passed its order on 10th November 2004. By an amendment in 2005, 5th proviso was inserted to sub Section 3 of Section 80HHC, which reads as under :

> *Provided also that in case the computation under clause (a) or clause (b) or clause (c) of this sub-section is a loss, such loss shall be set off against the amount which bears to ninety per cent of -*
>
> *(a) any sum referred to in clause (iiia) or clause (iiib) or clause (iiic), as the case may be, or*
>
> *(b) any sum referred to in clause (iiid) or clause (iiie), as the case may be, of section 28, as applicable in the case of an assessee referred to in the second or the third or the fourth proviso, as the case may be,*
>
> *the same proposition as the export turnover bears to the total turnover of the business carried on by the assessee.*

This insertion was with retrospective effect from 1st April 1992. Therefore, even for a moment we accept what Mr. Suresh Kumar submitted that the calculation by CIT (A) was not correct, still pursuant to this amendment coming into force with retrospective effect, respondent will be entitled to deduction under Section 80HHC even where profits derived from the export of goods was a negative figure, i.e., even where there was a loss.

5 As regards question no.3, first of all the issue raised, in our opinion, would be question of fact and cannot be question of law. The

Assessing Officer has proceeded on the basis that in the case of cash purchases, supply and delivery is given only at the time of payment and that the cash withdrawn on or before the date of purchase was less than the amount of purchase. At the same time, he also accepts that cash has been withdrawn after the date of purchase and if the cash withdrawal made on or before the date of purchase is added to cash withdrawal after the date of purchase, it almost tallies with the amount of purchase. Moreover, it is not denied anywhere that any purchases were ever made or the entries for cash payments made were bogus entries. The only basis we find, when we read the entire order, for the Assessing Officer to come to the conclusion that he has arrived at that the explanation was unsatisfactory is because in his belief, based on a presumption, in cash purchases full consideration has to be paid before taking delivery. He has also stated that some of the suppliers had stated that they have not supplied to respondent but can that be a substantial question of law whether such supplies were made or otherwise? In our opinion, these are questions of fact. We also have to note that there is a finding that the Assessing Officer has accepted as genuine the payment made to the same suspect parties before the date of purchase.

6 In our view, the Tribunal has not committed any perversity or applied incorrect principles to the given facts and when the facts and circumstances are properly analysed and correct test is applied to decide the issue at hand, then, we do not think that question as pressed raises any

substantial question of law.

7 The appeal is devoid of merits and it is dismissed with no order as to costs.

(AMIT B. BORKAR, J.) **(K.R. SHRIRAM, J.)**