

IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION (INCOME TAX)
ORIGINAL SIDE

ITA/32/2005
AI CHAMPDANY INDUSTRIES LIMITED
VS.
COMMISSIONER, INCOME TAX, CENTRAL-II, KOLKATA, WEST BENGAL

BEFORE :
THE HON'BLE JUSTICE T.S. SIVAGNANAM
And
THE HON'BLE JUSTICE SUPRATIM BHATTACHARYA
Date : 16th September, 2022

Appearance :
Mr. J.P. Khaitan, Sr. Adv.
Mr. Saumya Kejriwal, Adv.
Mr. Abhijit Guha Ray, Adv.
....for appellant

Mr. Tilak Mitra, Adv.
... for respondent

The Court : This appeal by the assessee filed under Section 260A of the Income Tax Act, 1961 (the Act, for brevity) is directed against the order dated January 28, 2005, passed by the Income Tax Appellate Tribunal, 'B' Bench, in ITA No.548/Kol/2003 for the assessment year 1994-95.

The appeal was admitted on 25th April, 2005 on the following substantial questions of law :-

- i) Whether the findings of the Tribunal that there was omission or failure on the part of the appellant to disclose fully and truly the material facts and/or their were sufficient materials and/or grounds and/or justification for initiation of the reassessment proceedings are perverse and based on no material whatsoever and was arrived at ignoring the relevant materials on record in particular its own order in the rectification proceedings and

the various orders passed by Assessing Officer increasing or reducing the relief under Section 80HHC of the Act?

- ii) Whether the purported assessment proceedings initiated by the Tribunal for the said assessment year 1994-95 is without jurisdiction and illegal since none of the conditions precedent for assumption of the jurisdiction existed and/or were satisfied?

We have heard Mr. J.P. Khaitan, learned Senior Counsel, assisted by Mr. Saumya Kejriwal, learned Advocate appearing for the appellant/assessee and Mr. Tilak Mitra, learned standing Counsel appearing for the respondent/revenue.

The assessee during the financial year ended March 31, 1994 exported jute goods manufactured by it and also those purchased from the market. In respect of the profits made on export of such jute goods the assessee was entitled to deduction under Section 80HHC of the Act. Since the assessee was exporting both goods manufactured by it and that purchased from the market, its export profit had to be determined in terms of clause (c) of Sub-section (3) of Section 80HHC and such profits were to be further increased by the amounts mentioned in the proviso to the said Sub-section. Sub-section (4) of Section 80HHC provided that the deduction to Sub-section (1) shall not be admissible unless the assessee furnished in the prescribed form along with return of income the report of an accountant certifying that the deduction has been correctly claimed in accordance with the provisions of the said Section. During the said financial year on the export of the trading goods the assessee had suffered a loss of Rs.22,08,222/- and earned a profit from export of own manufactured goods to the tune of Rs.3,54,97,167/-. According to the assessee,

in terms of Sub-section (3) of Section 80HHC, the amounts were required to be increased and considering the decision, which was in vogue at the relevant point of time, passed by the Special Bench of the learned Tribunal in the case of *International Research Park Laboratories Ltd.*, (1995) 212 ITR (AT) 1 holding that there need not be profit in the export business for availing deduction under Section 80HHC. The Chartered Accountant of the assessee issued a certificate in Form 10CCAC computing deduction under Section 80HHC at Rs.3,54,167/-. In the said certificate it was mentioned against item no.6 – Export turnover of trading goods of Rs.26,97,49,503/- and against item nos.7, 8 and 9 direct and indirect cost of trading goods aggregating to Rs.49,06,34,725/-. In terms of the figures mentioned in item nos.6, 7, 8 and 9, there was a loss of Rs.22,08,86,222/- from the export of trading goods. In item no.10, which was meant to disclose the profit from export of trading goods i.e., subtracting the figure mentioned in item no.6 with that mentioned in item no.9, the Chartered Accountant filled up the said column as “nil” since there was no profit. The return of income for the assessment year under consideration i.e., 1994-95 was filed by the assessee on 30.11.1994 claiming deduction under Section 80HHC as per the Chartered Accountant’s certificate dated 28.11.1994. It is thereafter the Cochin Bench of the learned tribunal in the case of *A. M. Moosa vs. CIT* reported in [1996] 86 Taxman 161 (Cochin), by judgment dated 14.9.1995 held that loss was to be ignored while computing the deduction under Section 80HHC of the Act. The assessing officer discussed the case with the assessee and passed an assessment order under Section 143(3) of the Act dated 3.3.1997 allowing deduction under Section 80HHC of Rs.3,54,97,167/- in terms of the certificate issued by the Chartered Accountant in the statutory format. Thereafter, the assessee filed a petition under Section 154 of the Act with a prayer before the

assessing officer to increase the deduction under Section 80HHC on the basis of the total income determined in the assessment. The assessing officer after discussing the case with the assessee passed an order on 19.9.1997 under Section 154 read with Section 143(3) allowing the enhanced deduction under Section 80HHC as per computation filed by the assessee in their letter dated 10.5.1997. On 3.11.1997 the assessing officer received an audit objection according to which loss from export of trading goods was to be set off against profit from export of manufactured goods and the resultant figure should be adjusted against the export incentives to arrive at admissible deduction under Section 80HHC. It was alleged that in the assessee's case no deduction was admissible after setting off loss from export of trading goods. Based on the said audit objection, the assessing officer issued notice under Section 154 dated 11.12.1997 to rectify the computation under Section 80HHC by adjusting setting off export of trading goods with profit on export of manufactured goods. The assessee filed their objections to the said notice on 17.2.1998. As against the order of assessment dated 3.3.1997 under Section 143(3), on other issues, the assessee had filed appeal before the Commissioner of Income Tax (Appeals) [CIT(A)] who passed an order on 31.3.1998 granting various reliefs. This order passed by the CIT(A) was given effect to on 30.4.1998 and a deduction of Rs.4.02 crores was allowed under Section 80HHC of the Act. It is thereafter a notice was issued to the assessee under Section 148 of the Act dated 18.11.1998 for reopening the assessment proposing withdrawal of the deduction granted under Section 80HHC of the Act. Reasons for reopening was also furnished to the assessee, who, in turn, filed their objections on 5.1.1999. For about nearly six months the assessing officer did not proceed further with the reopening proceedings, but on 11.6.1999 passed an order under Section 154 of the Act

pursuant to the notice dated 11.12.1997 withdrawing the deduction allowed under Section 80HHC of the Act. Aggrieved by such order, the assessee filed appeal before the CIT(A) which was allowed by order dated 15.12.1999 and the order of the CIT(A) was given effect to by order dated 12.1.2000 cancelling the rectification order and allowing deduction of Rs.4.02 crores under Section 80HHC. After nearly one year the assessing officer passed an order of reassessment on 30.3.2001 under Section 143(3) read with Section 147 of the Act disallowing the deduction under Section 80HHC and also making other additions on the ground that the assessee has wrongly interpreted the said Section. As against the order passed by the CIT(A) dated 15.11.1999, the revenue had earlier filed appeal to the learned Tribunal which was dismissed by order dated 20.8.2002. It appears that as against the order passed by the learned Tribunal, the Department did not pursue the matter before this Court. Thus, the issue with regard to the rectification which was discussed by the assessing officer withdrawing the deduction under Section 80HHC of the Act by order dated 11.6.1999 stood set aside and the same attained finality upon dismissal of the appeal filed by the revenue before the learned tribunal vide order dated 20.8.2002. As against the reassessment order dated 30.3.2001, the assessee filed appeal before the CIT(A) which was allowed by order dated 20.11.2002 primarily on the ground that the reopening of the assessment was a case of change of opinion and based on an audit objection, reopening of the assessment could not have been done apart from other reasons. The revenue being aggrieved by such order filed appeal before the learned tribunal which allowed the revenue's appeal by order dated 28.1.2005 and challenging the said order, the assessee has preferred this appeal which has been admitted to decide the aforementioned substantial questions of law.

After having elaborately heard the learned Advocates for the parties and carefully perusing the materials placed on record, we are of the considered view that the conclusion arrived at by the CIT(A) is just and proper and we find that the learned tribunal was not justified in reversing the order passed by the CIT(A). We support such conclusion with the following reasons.

Admittedly, the reopening of the assessment was based upon an audit objection. It is not in dispute that the audit objection was not based upon discovery of any new facts or figures, but solely based upon an interpretation of the statutory provision as understood by the audit wing of the income tax Department. The question would be as to whether such could be the basis for reopening the assessment. In this regard, it is beneficial to refer to the decision of the Hon'ble Supreme Court in *Indian and Eastern Newspaper Society vs. Commissioner of Income Tax, New Delhi* reported in (1979) 119 ITR 996 wherein it was held as follows:

“It is not a declaration by a body authorised to declare the law. That part alone of the note of an audit party which mentions the law which escaped the notice of the ITO constitutes “information” within the meaning of s.147(b); the part which embodies the opinion of the audit party in regard to the application or interpretation of the law cannot be taken into account by the ITO. In every case, the ITO must determine for himself what is the effect and consequence of the law which has now come to his notice. He can reasonably believe that income has escaped assessment. The basis of his belief must be the law of which he has now become aware. The opinion rendered by the audit party in regard to the law cannot for the purpose of such belief add to or colour the significance of such law. In short, the true evaluation of the law in its bearing on the assessment must be made directly and solely by the ITO.”

The above decision is a straight answer to the question as to whether the audit party can interpret the law in a particular fashion and based on such interpretation whether reopening of the assessment could be resorted to. The answer to the said question should be in negative and in favour of the assessee. Further, we also take note of the decision of the Hon'ble Supreme Court in the case of *Commissioner of Income Tax vs. Kelvinator of India Ltd.* reported in 2010 320 ITR 561 (SC) wherein it was pointed out that one needs to give a schematic interpretation to the words "reason to believe"; failing which Section 147 would give arbitrary powers to the assessing officers to reopen the assessment on the basis of the mere "change of opinion" which cannot be per se reason to reopen. In fact, the CIT(A) took note of the decision in *Kelvinator of India Ltd.* reported in [2002] 256 ITR 1 (Delhi) [FB] which was subsequently affirmed by the Hon'ble Supreme Court in the aforementioned decision. Taking note of the factual position namely, with regard to the proceedings initiated under Section 154 of the Act, the CIT(A) held that before the reassessment the opinion of the assessing officer underwent a series of changes from the original assessment order where he was in total agreement with the assessee and thereafter totally disagreed with the assessee while rectifying the original assessment order under Section 154 of the Act withdrawing the deduction allowed under Section 80HHC and, subsequently, in passing the reassessment order and disallowing the assessee's claim for deduction. After noting these facts, the CIT(A) had pointed out that no new material or facts came to the knowledge of the assessing officer after passing the original assessment order and also the first order under Section 154 of the Act while initiating reassessment under Section 148 and he relied upon the same set of material and the audit objection and using these materials he cannot initiate rectification proceedings under Section 154 of the

Act and concluded, in our view, rightly that there was no additional material available with the assessing officer which was not available to him at the time of original assessment or passing the order under Section 154 of the Act. Furthermore, the CIT(A) pointed out that the audit department's interpretation of law cannot constitute material for initiating reassessment as it is not for the audit party to interpret the law. Furthermore, the CIT(A) pointed out that the materials as well as the decisions which were referred to by the assessing officer in the reassessment proceedings were all available at the time of original assessment and, therefore, the reopening was held to be bad in law as it was based on change of opinion. On appeal before the Tribunal, the revenue reiterated the stand taken before the CIT(A).

While on this issue we take note of the decision in the case of *COMMISSIONER OF INCOME TAX VS. MAX INDIA LIMITED* ;2004 68 ITR 128 (P&H), the said case arose for assessment for the year 1992-1993 and the facts in the said case are more or less identical to the case on hand. The Hon'ble Division Bench of Punjab & Haryana High Court held as follows :

"We find no merit in this contention. For expressing a view, it is not necessary that it should be based on a judicial pronouncement. A view has to be expressed on the basis of the provisions of law as applicable to the facts of a case. It is not in dispute that the view expressed by the Assessing Officer is in conformity with the view subsequently expressed by the various benches of the Tribunal. We are, therefore, satisfied that the Tribunal was justified in holding that the view expressed by the Assessing Officer was a possible view and since the Assessing Officer has taken a possible view, the Commissioner had no jurisdiction to interfere by exercising his powers under section 263 of the Act. In this behalf, we may refer to the decision of the Supreme Court in Malabar Industrial Co. Ltd. V. CIT [2000] 243 ITR 83, wherein at page 88 it has been held as under (page 88) :

"The phrase 'prejudicial to the interests of the Revenue' has to be read in conjunction with an erroneous order passed by the Assessing Officer. Every loss of revenue as a consequence of an order of the Assessing Officer cannot be treated as prejudicial to the interests of the Revenue. For example, when an Income-tax Officer adopted one of the courses permissible in law and it has resulted in loss of revenue; or where two views are possible and the Income-tax Officer has taken one view with which the

Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the Revenue, unless the view taken by the Income-tax Officer is unsustainable in law.....”

In view of the above, we are satisfied that no substantial question of law arises out of the order of the Tribunal. The appeal is dismissed in limine.”

The revenue preferred appeal against the said decision which was dismissed in the case of *COMMISSIONER OF INCOME TAX VS. MAX INDIA LTD. 2007 295 ITR 282 (SC)* wherein the Hon’ble Supreme Court had taken note of the fact that Section 80HHC had been amended eleven times and different views existed on the day, when the *COMMISSIONER* (therein) passed the order in the said case. That apart the Hon’ble Supreme Court also took note of the amendment which was made to the Section in 2005 with retrospective effect and held that such retrospective amendment will not attract the provisions of Section 263. This interpretation would equally apply to a reassessment proceedings under Section 148 of the Act. The relevant portion of the judgment is quoted hereinbelow.

“According to the learned Additional Solicitor General, on an interpretation of the provision of section 80HHC(3) as it then stood the view taken by the Assessing Officer was unsustainable in law and therefore the Commissioner was right in invoking section 263 of the Income-tax Act. In this connection, he has further submitted that in fact the 2005 amendment which is clarificatory and retrospective in nature itself indicates that the view taken by the Assessing Officer at the relevant time was unsustainable in law. We find no merit in the said contentions. Firstly, it is not in dispute that when the order of the Commissioner was passed there were two views on the word “profits” in that section. The problem with section 80HHC is that it has been amended eleven times. Different views existed on the day when the Commissioner passed the above order. Moreover, the mechanics of the section have become so complicated over the years that two views were inherently possible. Therefore, subsequent amendment in 2005 even though retrospective will not attract the provision of section 263 particularly when as stated above we have to take into account the position of law as it stood on the date when the Commissioner passed the order dated March 5, 1997 in purported exercise of his powers under section 263 of the Income-tax Act.”

We find that the learned Tribunal has written an elaborate order. However, we are surprised to find that the learned Tribunal has held that the assessee suppressed the material facts which was never the allegation in the reasons recorded for reopening. It is not clear as to on what basis the learned Tribunal came to such a conclusion. In fact, the learned Tribunal has accepted the legal position that the assessment cannot be done on a mere change of opinion. However, it sought to justify the reassessment order on the ground that the certificate furnished by the Chartered Accountant the figure of loss was not shown, though the figure of the sale proceeds of the trading goods and the direct and indirect costs were shown. That apart, we find that the finding of the learned Tribunal that the assessing officer had no occasion to or did not examine the claim for deduction under Section 80HHC of the Act is thoroughly flawed and equally is the finding of the learned Tribunal that there was suppression of facts made by the assessee. In the preceding paragraphs we have pointed out that not only once but twice proceedings under Section 154 of the Act was initiated and both the proceedings were on the very same issue as regards the entitlement of the assessee to claim deduction under Section 80HHC of the Act. Therefore, such finding of the learned tribunal was absolutely perverse. The learned Tribunal also had held that no conscious opinion was formed by the assessing at the original assessment stage while allowing deduction under Section 80HHC of the Act and there was no exemption or deliberation. This finding appears to be no supported by any justifiable reasons but on a perusal of the assessment order it is definitely clear that the case was discussed with the assessee and thereafter taking into consideration the Chartered Accountant's certificate the deduction as claimed was granted. In fact, there were two decisions of the learned Tribunal which were namely, *International Research*

Park Laboratories Ltd. and *A.M. Moosa* which decisions would clearly support the stand and the conclusion arrived at the by the assessing officer while completing the scrutiny assessment under Section 143(3) of the Act vide order dated 3.3.1997.

Thus, we find that the learned Tribunal erroneously reversed the order passed by the CIT(A) who has considered the facts and circumstances and rightly applied the legal position. In the result, we find that the order of the learned Tribunal calls for interference.

Accordingly, the appeal filed by the assessee is allowed and consequently, the substantial questions of law are answered in favour of the assessee.

(T.S. SIVAGNANAM, J.)

(SUPRATIM BHATTACHARYA, J.)