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

INCOME TAX APPEAL NO. 115 OF 2003

M/s. Raitan Pvt. Ltd.
having its registered office at Hague
Building, Sprott Road, Ballard Estate,
Mumbai – 400 038 … Appellant

V/s.

Deputy Commissioner of Income Tax
Special Range – 28, R. No. 621, 6th Floor,
Aayakar Bhavan, M.K. Road,
Mumbai – 400 020 ... Respondent

Mr. Ashok Patil i/b. Ms. Jyoti N. Dialani for the Appellant

Mr. Suresh Kumar for the Respondent

CORAM : NITIN JAMDAR & N.R. BORKAR, JJ.

DATE: 08 JUNE 2022

Oral Judgment *(Per Nitin Jamdar, J.) :*

This Income Tax Appeal filed by the Appellant – Assessee challenges the judgment and order passed by the Income Tax Appellate Tribunal dated 7 June 2002, allowing the Income Tax Appeal No. 7168 of 1994 filed by the Respondent – Revenue.

2. The Assessment Year in question is 1991-92.

3. The Appellant – Assessee, is a private limited company trading in wattle extracts. The Appellant filed its return of income for the Assessment Year 1991-92 on 31 January 1992, disclosing a total income of Rs.22,18,060/-. According to the Assessee, the total turnover was Rs.8,16,49,397/-, out of which export turnover was Rs.5,78,02,396/-. The Assessee showed a profit of Rs.48,71,622/-. The Assessee claimed deduction under Section 80HHC of the Income Tax Act to the extent of Rs.4,1,13,844/-. The Assessing Officer noticed from the profit and loss account of the Assessee that the income includes Rs.60,71,414/- as commission income, and the profit before taxation was Rs.61,51,622/-. Having opined that same was due to commission income and there was no export profit and that the claim of deduction under Section 80HHC was not admissible, a notice was issued to the Assessee on 21 January 1994 to explain why deduction under Section 80HHC should be disallowed. The Assessee replied by the letter dated 3 February 1994, stating that the deduction claimed by the Assessee is in accordance with Section 80HHC(3) and was rightly claimed. The Assessing Officer did not accept the explanation of the Assessee and disallowed the deduction claimed by the Appellant–Assessee under Section 80HHC. The Assessee filed an Appeal before the Commissioner of Income Tax (Appeals). The Commissioner of Income Tax (Appeals) analyzed the provisions of Section 80HHC

and observed that the commission is relatable to export and cannot be excluded from profit and gains business for working out the deduction under Section 80HHC. The Commissioner (Appeals) held that there is no need for any profit to be in existence in the export business for benefit under Section 80HHC. Accordingly, the appeal filed by the Assessee was allowed by the Commissioner of Income Tax (Appeals) by order dated 14 January 1994.

4. The Respondent – Revenue filed an appeal bearing No. ITA No. 7168 of 1994 in the Income Tax Appellate Tribunal, Mumbai, challenging the order passed by the CIT (Appeals) The Tribunal observed that a receipt which has nothing to do with the export activity of the Assessee would have to be excluded both from the business profit as well as total turnover in respect of Section 80HHC. The Tribunal observed that Clause (b) and (baa) in the explanation to Section 80HHC inserted by Finance Act, 1991, which was brought into force on 1 April 1992, was retrospective in nature and was applicable to the concerned Assessment Year and, therefore, the commission income will stand excluded from the business profit. The Tribunal held that once it is excluded, there can be no profit from the export business to enable the Assessee to claim the deduction under Section 80HHC. The Appeal of the Revenue was accordingly allowed by order dated 7 June 2002.

5. Being aggrieved, the present appeal is filed by the Appellant – Assessee. The Appeal was admitted by order dated 7 October 2004 on the following question:-

> *"Whether on the facts of the case and in law the Appellate Tribunal was justified in reversing the order of the CIT(A) allowing the claim of deduction of Rs.41,13,844/- u/s. 80HHC to the Appellant ?"*

6. Having heard the learned Counsel for the parties, we find that the issues raised in the Appeal and dealt with by the Tribunal have been answered in favour of the Assessee by the subsequent decision of the Hon'ble Supreme Court.

7. The first issue held against the Appellant–Assessee by the Tribunal is the retrospective applicability of the amendment of the year 1991 by the Finance Act of 1991. The Tribunal has held that the amendment was retrospective in nature, and on that basis, commission was not eligible for exemption of tax under Section 80HHC. In the case of *P.R. Prabhakar v/s. Commissioner of Income Tax*[1], the Supreme Court considered the question as to whether the amendment of the year 1991 was prospective or retrospective. The Supreme Court observed that the amendment of the year 1991 was prospective in nature. In the light of decision *P.R. Prabhakar*, the view taken by the Tribunal that the amendment is retrospective in

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nature and therefore, the commission would not entitle the Appellant – Assessee for exemption does not survive. In fact, this finding of the Tribunal was the foundation of its decision. In the case of *P.R. Prabhakar*, the Supreme Court also observed that since the amendment to Section 80HHC of the year 1991 was prospective, the commission for export constituted export profits and the assessee would be entitled to deduction under Section 80HHC for the Assessment Year 1991 that is prior to the amendment. The Supreme Court has settled these two questions in its decision. Both grounds on which the Tribunal passes the impugned order therefore do not survive.

8. The learned Counsel for the Respondent – Revenue sought to contend that though it is true that the decision in the case of *P.R. Prabhakar* would cover these two issues as above, it is not that every kind of commission that would lead to claim under Section 80HHC. The learned Counsel submitted that in the decision of *P.R. Prabhakar*, the commission therein was for procuring export contract for other exporters on commission and it is this type of commission that is contemplated. The learned Counsel for the Appellant – Assessee submitted that the Respondent never raised this issue and all authorities have proceeded on the ground that the commission was related to export activities.

9. We have perused the orders of the Assessing Officer, Commissioner of Income Tax (Appeals) and the Tribunal. There was no debate that the commission claimed by the Appellant – Assessee was not related to export. In fact, the authorities have observed that, in law the Appellant – Assessee was not entitled to claim commission, of any kind, in respect of claim under Section 80HHC and there was no differentiation made as regards the type of commission. Even otherwise, the learned Counsel for the Appellant – Revenue has placed on record the audited account by way of praecipe wherein it is shown that the commission was received by the Appellant – Assessee in foreign exchange and was relatable to export.

10. This being the position wherein the questions of law framed in this Appeal having been answered in favour of the Appellant – Assessee by the decision of the Supreme Court as above, the Appeal will have to be allowed and the question framed will have to be answered accordingly.

11. The learned Counsel for the Respondent – Revenue states that the matter will have to be sent to the concerned Assessing Officer for further calculations.

12. As a result, the question of law as above is answered in favour of the Appellant – Assessee. The impugned order passed by the Income Tax Tribunal is quashed and set aside. The concerned Assessing Officer will carry out the calculations in the light of what is observed in this judgment and proceed further as per law.

N.R. BORKAR, J. ***NITIN JAMDAR, J.***