

**Petron Engineering Construction Ltd. Vs. Cit and anr.**

**Petron Engineering Construction Ltd. Vs. Cit and anr.**

**SooperKanoon Citation :** [sooperkanoon.com/363388](http://sooperkanoon.com/363388)

**Court :** Mumbai

**Decided On :** May-07-2009

**Reported in :** (2009)227CTR(Bom)380; [2009]318ITR388(Bom);  
[2010]187TAXMAN212(Bom)

**Judge :** I. Rebello and ;J.H. Bhatia, JJ.

**Appellant :** Petron Engineering Construction Ltd.

**Respondent :** Cit and anr.

**Judgement :**

**J.H. Bhatia, J.**

1. The petitioner had, with prior permission dated 3-5-1991 from the Reserve Bank of India, entered into a contract with M/s Gulf Import & Export Co., Dubai for providing services for erection and commissioning of a plant of pulses, barley and soya micronizing with all related service equipments. As per the said terms, the contract period was to be from 17-1-1991 to 16-1-1992. As per the provisions of Section 80HHB(3)(iii) of the Income Tax Act, as in force at that time, the petitioner was required to bring back 50 per cent of profits and gains in convertible foreign exchange into India within period of six months from the end of the previous year i.e., the financial year to take benefit of deduction from the income for computation of income-tax. As per this order and the provisions of law, earnings in foreign exchange were to be brought back on or before 30-9-1992. The petitioner filed

returns for the assessment year 1992-93 on 29-1-1993. Thereafter, by letters dated 2-2-1993, 26-5-1993 and 3-8-1993 addressed to the CIT, the petitioner sought extension of time to bring in foreign exchange equivalent to 50 per cent of profits and gains for the purpose of deduction under Section 80HHB of the Income Tax Act. The CIT by impugned order dated 5-8-1993 rejected the application to the extent of deficit in the amount which was to be brought back on or before the end of September, 1992, holding that the assessee had failed to prove that it was unable to remit the foreign exchange for reasons beyond its control. According to the petitioner, there was delay in bringing the foreign exchange to the tune of Rs. 20,64,184, while foreign exchange equivalent to Rs. 25,83,560 was already remitted within the prescribed period. The deficit amount was also brought back in foreign exchange by the end of May, 1993. Due to rejection of application for extension of time, the petitioner would not be entitled to deduction of the amount of Rs. 20,64,184 from the profits for the purpose of computation of income-tax. Therefore, the petitioner has by this petition challenged the order dated 5-8-1993 passed by the CIT.

2. Heard the learned Counsel for the parties and perused the contentions made by the petitioner in the present petition as well as in the several letters addressed to the RBI and the CIT in this respect.

3. As per the provisions of Section 80HHB, where the gross total income of an assessee, being an Indian company or a person who is resident in India, includes any profits and gains derived from the business of the execution of a foreign project undertaken by the assessee in pursuance of a contract entered into by him with a government of a foreign State or a statutory or other public authority or agency or a foreign enterprise, in computing the total income of the assessee, deduction of an amount equivalent to 50 per cent of such profits and gains would be allowed, provided the consideration for execution of such project or such work is payable in convertible foreign exchange. Sub-section (3) of Section 80HHB puts certain conditions for taking the benefit of deduction. Besides, other conditions, it also provides that an amount equivalent to 50 per cent of such profits and gains is brought back by the assessee in convertible foreign exchange into India, in accordance with the provisions of Foreign Exchange Regulation Act, 1973, within

a period of six months from the end of the previous year or where the Chief Commissioner or Commissioner is satisfied, for reasons to be recorded in writing, that the assessee is, for reasons beyond his control, unable to do so within the said period of six months, within such further period as the Chief Commissioner or Commissioner may allow in this behalf. From this, it is clear that normally, 50 per cent of the profits and gains should be brought into India in convertible foreign exchange within a period of six months. However, if for reasons beyond his control, the assessee is unable to bring the amount back within the period of six months, the period may be extended by the Chief Commissioner or Commissioner.

4. In the present case, the contract entered into with the foreign company was for erection and commissioning of the plant of pulses, barley etc. with all related service equipments and for this permission was taken from the Reserve Bank of India. As per the record, the original contract was worth DHS 22,20,150 and the contract was for a period of one year. According to petitioner, during the completion of that contract, the petitioner had an opportunity of carrying out other extra work which had been included as a part of the erection of the pulses plant and due to this additional work, the revised contract value was DHS 75,15,200.64. Thus, there was substantial increase in the value of the contract. According to the petitioner, the additional work was the part and parcel of the same project, i.e., the erection and commissioning of the pulses plant. If as per the original contract, it would bring back the 50 per cent of the profits and gains into India in foreign exchange upto 30-9-1992, it would be required to make further arrangement for finances for carrying out the work and for that purpose, a lot of time would be required and it would cause unnecessary procedural formalities and delay. That would also cause loss of further contract and other penal consequences. To avoid this, it was necessary for the petitioner to carry out the additional work of the contract and, therefore, it was not possible for the petitioner to bring the amount of foreign exchange back within the specified period.

5. On perusal of the terms of the contract as approved by the Reserve Bank of India on 3-5-1991 and the letters addressed by the. petitioner to the Reserve Bank of India on 9-2-1993 and 3-6-1993 as well as to the Commissioner in this respect,

we find that the petitioner had brought all the facts to the notice of these authorities. The learned Counsel for the petitioner contended that there were circumstances which prevented the petitioner to bring back the amount in foreign exchange within the specified (period) and the intention of the petitioner was not to avoid bringing of the foreign exchange back to the country, but it was beyond control of the petitioner to bring back the amount within a period of six months. Had the petitioner brought back the money within the specified period, there was every possibility that the petitioner could not complete the additional work of the contract which was also necessary for completion of that project which was entrusted to the petitioner. If the petitioner would fail to complete that project or if because of the procedural requirements, the execution of the work would be delayed and the petitioner would lose confidence of the foreign contractor, there was a possibility that it would lose the said contract as well as future business in that area. It would not be in the interest of the petitioner nor it would be in the interest of our own country. The learned Counsel contended that the deduction under Section 80HHB was provided since 1982 with a view to strengthening the competitiveness of our construction contractors who have undertaken projects outside India. In the Budget Speech of 1982, the Finance Minister, while emphasising the strengthening the competitiveness of our construction contractors, proposed to exempt 25 per cent of the profits derived by them from such foreign contracts from computation of income-tax and later on, the deduction was raised from 25 per cent to 50 per cent.

6. The learned Counsel for the revenue contended that if there were circumstances due to which the 50 per cent of the profits and gains could not be brought back into India in foreign exchange within the specified period of six months i.e. on or before 30-9-1992, it was necessary for the petitioner to make a request to the concerned authorities and to seek extension of time in advance. He contended that the petitioner submitted the returns for the financial year 1991-92 (assessment year 1992-93) on 29-1-1993 and till that time no request was made for the purpose of extension of time. It made this request for the first time by a letter dated 2-2-1993 to the CIT and this request was repeated by its letters dated 26-5-1993 and 3-8-1993. It is contended that this belated request could not be considered.

7. The learned Counsel for the petitioner vehemently contended that it is neither expected nor it is possible to make such a request for extension before expiry of the period of six months after the end of financial year because that request would be premature and the request could be made only if the concerned contractor cannot fulfil the obligation of bringing back the amount in foreign exchange as per the terms of Section 80HHC. The learned Counsel finds support from several authorities. Most of the authorities relied upon by the petitioner are under Section 80HHC which are in pari materia with Section 80HHC except that Section 80HHC relates to the execution of the projects outside the country, while Section 80HHC relates to export of goods from India. Under Section 80HHC also deduction is allowed from the earnings provided the money is brought into India in convertible foreign exchange within a period of six months or within such further period as the CIT may grant.

8. In *Azad Tobacco Factory (P) Ltd. v. CIT and Ors.* : (1997) 225 ITR 1002 (All), dealing with the provisions of Section 80HHC of the Income Tax Act, the Division Bench of the Delhi (sic--Allahabad) High Court observed as follows:

Now, a simple and short question emerges--

(a) Whether Section 80HHC(2)(a) contemplates the making of an application for claiming deduction ?

(b) If so, whether such application is to be made before the expiry of the said period of six months ?

After dealing with the arguments of the learned Counsel for the parties in respect of these two questions, the Division Bench of the Delhi (sic-- Allahabad) High Court observed as follows:

According to us, the right to deduction under Section 80HHC is a right to the assessee which he can get straightaway if it is (sic) had within a period of a six months as contemplated therein. But, the said right appears to remain suspended if the assessee is unable to have it for the reasons beyond his control. In such circumstances, authority is empowered to allow further period to cover the period

of suspension as contemplated, if he is satisfied that the conditions contemplated are in existence. Therefore, it appears to us that the exercise to allow further time by the CIT is not dependent on the making of any application or that the said discretion is to be invoked before the expiry of the said period of six months, as has been sought to be argued by Mr. Misra.' 'In fine, according to our view, a plain reading of Section 80HHC(2)(a) does not contemplate the making of any application by the assessee within a period of six months either for availing of the deductibility with respect to sale proceeds received in or brought into India as contemplated therein within a period of six months from the end of the previous year or for the purpose of invoking the power of the Chief Commissioner or Commissioner to allow further period in case the assessee is unable to receive in or bring into India the sale proceeds for reasons beyond his control. If such a position is accepted, then there is no scope for making any application for the purpose of having the benefit of further period before the expiry of six months. On the other hand, it is our considered view that the deductibility claimed in the return is to be decided in computing the total income in case the six month period has expired before the assessee received or brought into India the sale proceeds, in that event, it is for the assessing authority to place the same before the Chief Commissioner or Commissioner if the assessee proposes to satisfy that he was unable to do so for reasons beyond his control. Inasmuch as the assessing authority having not been invested with the power granted under Sub-section (2)(a) for allowing further period, he can neither refuse nor deal with the same. Therefore, it is imperative on its part to place the same before the Chief Commissioner or Commissioner, as the case may be. The assessee may also bring the fact to the notice of the Chief Commissioner or Commissioner, but in that event, no time-limit can be applied except that the claim is to be made in the return to be filed. This authority was relied upon by the Calcutta High Court in *Geekay Exim (India) Ltd. and Anr. v. CIT and Ors.* : (1998) 234 ITR 560 (Cal) and again by the Delhi High Court in *Narinder Kumar Arora and Anr. v. CIT* : (2000) 245 ITR 10 (Del), wherein the Delhi High Court observed as follows: In our view, a party ought to be able to make the application after the expiry of the period of six months. Rather, in the normal course, the occasion for making such an application would arise only when the period of time has already expired....

9. While construing the meaning of the word 'extend' in Section 139(2), the Supreme Court observed as follows in CIT v. Ajanta Electricals : (1995) 215 ITR 114 (SC):

We cannot accept the contention raised on behalf of the revenue that the word extend in the proviso to Section 139(2) implies that at the time of making the application the time allowed should not have expired. Though the Civil Procedure Code, 1908, by itself does not apply to the proceedings under the Income Tax Act, we see no reason why a principle of procedure evolved for doing justice to a party to the proceeding cannot be called in aid while interpreting a procedural provision contained in the Act.

10. Taking into consideration the legal position settled by the Supreme Court and by some of the High Courts, it is clear that the application/request for extension of time could be made after expiry of six months. Therefore, we find no substance in the contention of the learned Counsel for the revenue that the application could not be considered, as it was made after expiry of six months or after filing of returns.

11. In the present case, such request was made and valid reasons were given by the petitioner in its request letter. We also find that on 9-2-1993, the petitioner had given details about the extension of the contract as well as the stages of completion of contract and the receipts already made and the balance amount to be received to the RBI. While rejecting the application for extension of time, the CIT observed as follows:

3. The question for consideration is whether the assessee was unable to remit this foreign exchange for reasons beyond its control. This foreign exchange was received by the assessee. If it so decided it could remit them to India. However, instead of remitting the amount to India, it decided to use that for purpose of some other jobs there. Its decision to do so is a voluntary decision. Therefore, the non-remittance cannot be said to be for reasons beyond its control....

On perusal of material on record, we find that the petitioners had contended that while carrying out the main contract, they had opportunity of carrying out the other

extra work, which had been included as part of the erection order for the pulses plant. Petitioners also stated as follows in application dated 2-2-1993:

Since we have been working on extended jobs under this contract and we needed funds for redeployment on the ongoing jobs, the balance amount was retained outside India which could be brought into India only after the same had been realised from the ongoing jobs after 31-3-1992. Early remittances could have been made only at the cost of ongoing jobs which would have affected their timely completion and eventually would have resulted in the loss of reputation and business which is very important ,to sustain in the highly competitive foreign market.

In our considered opinion, if extension of work was part of the same project, which the petitioner was to complete as per original contract and not separate and independent contract, the reasons given by the petitioner for non-remittance of complete amount of foreign exchange within six months, these could be considered as circumstances due to which it was beyond control of the petitioner to bring the foreign exchange within time. This requires examination of all relevant documents pertaining to the additional work. The Commissioner could have called upon the petitioner to produce all relevant documents in that respect, before taking any decision on the application. Therefore, in our considered opinion, the order passed by the Commissioner needs to be quashed so that the application may be reconsidered.

12. For the aforesaid reasons, the petition is allowed. The impugned order dated 5-8-1993 passed by the Commissioner in rejecting the prayer for extension of time under Section 80HHB(3) of the Income Tax Act is hereby set aside. The matter is remanded back to the Commissioner to reconsider the application after giving opportunity to the petitioner to produce the relevant documents, and to decide the same in the light of above observations.