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Court : Income Tax Appellate Tribunal ITAT Mumbai

Decided On : Mar-27-1989

Reported in : (1990)32ITD689(Mum.)

Judge : S Kapur, N Prabhu

Appellant : inspecting Assistant

Respondent : Hoechst India Ltd.

Judgement :

1. These two cross appeals (one each by the Department and by the assessee) are consolidated and disposed of by a common order for the sake of convenience.. We shall deal with the appeal by the department first 2. The first ground in this departmental appeal is that the CIT(A) erred in allowing relief of Rs. 28,66,066 under the provisions of Section 35B on commission paid to Chemi Exports Kontours, G.M.B.H.It is submitted by the learned Departmental Representative that the relief granted by the CIT(A) is without any justification. Adverting to the amendment made by the Finance Act, 1980 w.e.f. 1/4/1981, it is pointed out that several of the sub-clauses of Section 35B(l)(b) have been deleted and those that survived did not enable the assessee to claim the relief as was ordered by the CIT (A). The claim has been processed by the CIT(A) under Clause (iv) of Section 35B(l)(b). This clause speaks of maintenance of an agency outside India for promotion of sale outside India of goods, services or facilities. Where the agreement under which commission has been paid contemplates payment for procurement of orders, this cannot be construed as maintenance of an agency

outside India and, therefore, it was wrong on the part of the CIT(A) to grant relief under Section 35B(l)(b) on such payments.

3. The learned counsel for the assessee, on the other hand, contends that no blemish can be attached to the order passed by the CIT(A).

There was an agreement which has been approved by the Reserve Bank of India and so also the payment of commission under the agreement.

Inviting our attention to Clauses (2) and (3) of the agreement it is submitted that the agents were not only to procure export business for the company's pharmaceutical products but were also required to undertake to promote company's product in foreign market and such promotional efforts would include preparation and translation wherever required, printing and distribution of literature and other connected documents and also distribution of written propaganda material. The agents were also required to arrange for distribution of samples of the company's products and to generate demand. They were to maintain an agency office, if found necessary and to undertake, if necessary, travel to various foreign markets in connection with promotion of export. The terms of the agreement spelt out in clear language, can leave no doubt that the assessee was maintaining an agency outside India. The assessee relies on the decisions of the Bombay High Court in CIT v. Godrej & Boyce Mfg. Co.(P.)Ltd. [1984] 149 ITR 594/17 Taxman 270 and Tribunal in J.H. & Co. v. Second ITO [1982] 1 SOT 150 (Bom.) (SB), Mettur Beardsell Ltd. v. ITO [1985] 11 ITD 631 (Mad.) (TM) and G & Co.

v ITO [1983] 3 ITD 566 (Bom.) (SB).

4. We have heard the parties to the dispute and in our opinion the claim of the assessee is unexceptionable. The decision of the Bombay High Court in Godrej & Boyce Mfg. Co. (P.) Ltd.' s case (supra) and the other three decisions of the Tribunal relied upon by the assessee support the case of the assessee. The payment, having regard to the terms of the agency agreement which has been approved by the R.B.I., is not a payment simpliciter for procurement of orders. The agents were required to undertake several other functions to publicise and

popularise the products manufactured by the assessee company. In that sense we are of the view that these payments could squarely be covered by Sub-clause (iv) of Section 35B(l)(b) of the Act and we see no reason to interfere with the order of the CIT(A). We may in this connection state that reliance placed by the assessing officer on Madras High Court decision in CIT v. Southern Sea Foods (P.) Ltd. [1983] 140 ITR 855 is totally misplaced. That was a case where payment was made in India for procurement of foreign orders and it was in this context the Madras High Court held that such payments would not be eligible for weighted deduction.

5. The next ground is that the learned CIT(A) erred in allowing relief under Section 80J on Universal Plant & Liquid Injectable Unit taking the value of capital employed as reduced by specific loans under IDBI and proportionate loans from Bank overdrafts and further erred thereby allowing rebate of Rs. 6,92,450 and Rs. 9,00,200 respectively.

It is submitted by the learned Departmental Representative that the CIT(A) was in error in directing the ITO to grant relief under Section 80J in regard to Universal Plant Unit commissioned in June 1980 as the same was financed exclusively from the borrowings from the banks. There was no outlay of any capital by the assessee. The I AC has clearly stated in his order that the fixed deposits from the public had increased during the year by Rs. 5,41,64,000 and this would clearly go to indicate that such borrowings have been utilised for setting up of the unit. The assessee has a common fund and this fund is made-up of own resources and also borrowed funds. In such circumstances it would not be proper to hold that outlay for setting up of a new unit has come out of own resources to the entire inclusion of borrowed funds. It was for this reason the IAC, was constrained to take a view that the unit had come up only with the borrowed funds and that there was an abnormal increase in the borrowings of the assessee, cannot be regarded as accidental. The same could be explained only because of the outlay by the assessee in the new unit. As regards the other unit, it is submitted by the learned Departmental Representative that the matter has been discussed at length by the I AC in the order for the year 1979-80. When the unit was first set up in that year, the I.A.C. had held that the assessee would not be entitled to any relief under

Section 80J in regard to this unit. It is, therefore, only but natural for the I.A.C. to deny the claim in second year of setting up.

6. The learned counsel for the assessee, on the other hand, contends that the view canvassed by the Departmental Representative is without regard to the facts of the case. The CIT(A) has discussed the matter in great length in his order. The profit of the company for the year ended 31-12-1979 after deduction the provision for taxation and dividends was Rs. 1,45,27,003. Similar profits for the year ended 31-12-1980 were to the tune of Rs. 1,17,42,995. The claim for depreciation was Rs. 98,14,890 and Rs. 1,35,88,010. The depreciation though allowed as deduction represents only the amounts retained by the assessee in business. The profits for the calendar year 1979-80 alone could explain the outlay in the new unit. The assessee in fact had deducted from the aggregate value of the assets specific borrowings from the IDBI and proportionate bank overdrafts and fixed deposits. It is further pointed out that the increase in the borrowings is matched by the increase in the current assets of the assessee company. This should clearly dispel the doubt in the minds of the tax authorities regarding the utilisation of the borrowed funds. The provisions of Section 80J are incentive provisions and it is the view of the Courts that they have to be interpreted in a very liberal manner. Inviting our attention to the decision of the Calcutta High Court in *Woolcombers of India Ltd. v. CIT* [1982] 134 ITR 219, it is submitted that similar view taken by the revenue did not find favour with the Court. That was a case where the assessee had paid advance tax out of funds comprising of assessee's business profits and borrowings. The Court held that since the profits were sufficient to meet the advance-tax liability, it should be presumed that in its essence and true character the taxes were paid out of the profits of the relevant year and not out of the overdraft account. Similar is the view taken by the same High Court in the case of *CIT v Askoka Charity Trust* [1982] 135 ITR 556. Our attention was further invited to the decision of the Andhra Pradesh High Court reported in *CIT v. Gopikrishna Muralidhar* [1963] 47 ITR 469. That was a case where the ITO sought to disallow part of the interest paid on the borrowed capital on the ground that the same was spent for house-hold expenses. The court observed that the borrowings were primarily for the purpose of business and the fact that later it was used for house-hold expenses, would not be a ground for disallowing a part of the expenses.

Further inviting our attention to 12 tax cases it is submitted that where the statute gave a concession to the assessee. It has to be construed in a most liberal manner and where two views are possible one that favours to the assessee should be preferred. As far as claim in regard to the other unit, viz., Liquid Injectable unit, it is submitted that the CIT(A) has dealt with this issue in great detail. Relief was granted to the assessee in an earlier year and it was for that reason the CIT(A) came to a finding that it would not be open to the I.A.C. to withdraw the relief for the year under consideration. Such order of the CIT(A) finds support in the decision in Saurashtra Cement & Chemical Industries Ltd. v. CIT [1980] 123 ITR 669 (Guj.) wherein the court has held that without disturbing the relief granted in the earlier year, the ITO cannot examine the question again and decide to withhold or withdraw the relief already granted under Section 80J of the ACL 7. We have heard the parties to the dispute. As regards the claim in regard to Universal Plant is concerned, we are of the view that the CIT(A)'s order on the facts available on record cannot be disturbed. We are dealing with the provisions of the Statute which grants concession to an assessee and as has been held by the Supreme Court in the case of Chandulal Harjiwandas v. CIT [1967] 63 ITR 627, the provisions for exemption or relief should be so construed as to effectuate the object of the Legislature and not to defeat it. This view has been reiterated by the Gujarat High Court in CIT v. Satellite Engg. Ltd. [1978] 113 ITR 208. The provisions of Section 80J are incentive provisions and are intended to give impetus to industrial activity. Such provisions, therefore, have to be construed liberally. That does not mean that tax authorities have to accept any working that has been provided by the assessee. The I.A.C. in this case had observed an abnormal phenomenon namely unprecedented increase in the borrowings of the assessee. This has coincided with the commissioning of the new unit. Such a phenomenon should naturally provoke a probe by the tax authorities as to whether the borrowings were utilised for the purpose of setting up a unit. But, however, the IAC left the matter at that and hastened to conclude that the borrowings were utilised for setting up of the new unit. He failed to establish any nexus between the borrowings and the investments in the new unit. In the absence of any material to link the investments in full with the borrowings made by the assessee, the CIT(A) was left with no option but to allocate the borrowings in proportionate manner. He

also found that the assessee had generated enough funds out of which at least a part of the capital outlay in the new unit could have been met.

We, in the circumstances, have no material to dispute his findings and we shall, therefore, uphold his order. As regards relief in regard to second unit, the CIT(A) while giving the relief has observed as under: 3.4 As regards the Liquid Injectable Unit also, the I AC (Assessment) will grant relief on the footing that the investment therein had come out of the accumulated profits to the extent that such profits were available for investment. In respect of this Unit, relief has already been allowed for the earlier and the appellant's case therefore becomes stronger in view of the Gujarat High Court judgment in the case of Saurashtra Cement & Chemicals Industries Ltd. v. CIT[1980] 123 ITR 669. It was held by the High Court that where relief under Section 80J has been allowed in the initial year, the I.T.O. cannot examine the question again without disturbing the relief granted in the initial year. Unless the relief granted for the earlier year is disturbed or changed on valid grounds, there cannot be valid grounds for withholding or withdrawing the relief which has been already granted once. The IAC (Assessment) is, therefore, directed to allow relief under Section 80J in respect of the Liquid Injection Plant also.

The findings of the CIT(A) are clear cut and unambiguous and are supported by the decision in Saurashtra Cement & Chemical Industries Ltd.'s case (supra). We, therefore, are not called upon to interfere with his order.

8. to 28. [These paras are not reproduced here as they involved minor issues.]

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