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Court : Income Tax Appellate Tribunal ITAT Patna

Decided On : Apr-13-1989

Reported in : (1989)31ITD1a(Pat.)

Judge : Y Upadhyay, Vice, S Banerjee

Appellant : inspecting Assistant

Respondent : Parikh Engg. and Body Building Co.

Judgement :

1 to 15. [These paras are not reproduced here as they involve minor issues.] 16. The next contention is in respect of direction of the CIT(A) to compute investment allowance at Rs. 11,59,076 on newly installed plant & machinery used for manufacturing and bottling of soft drinks and allow the same in subsequent year when the requisite reserve is created. In compendium, the learned CIT(A) recorded the enunciation of assessing officer for refusal of grant of investment allowance and they are : (i) The claim was not made in original return submitted on 31-12-1981 but it was made in the return filed on 2-7-1988 which was invalid as the time for filing the original return had not been extended ; a revised return Under Section 139(5) could not have been validly filed as the original return itself had not been submitted Under Section 139(1) or Under Section 139(2).

(ii) Section 32A(2)(iii) specifically excludes plant and machinery used for manufacture of an article specified in the list in the Eleventh Schedule, for the purpose of grant of Investment allowance and aerated waters in which blended

flavouring concentrate in any form is used being item No. 5 of the Eleventh Schedule of the IT Act, the machinery used for manufacture of such a thing did not qualify for investment allowance.

(iii) The claim of the assessee that soft drinks like, Thumps Up, Limca, Gold Spot etc. were manufactured by it not out of blended flavouring concentrates but out of sympathetic flavouring essence which was not a form of and concentrates, was not acceptable because the expression 'in any form' has been used not to bring about any distinction between different varieties of blended flavourings but to cover all kinds of flavourings, whether of natural or artificial variety used in the manufacture of aerated waters.

17. For the first objection, the learned CIT(A) viewed that the revised return filed by the assessee should be accepted as valid return Under Section 139(5) because the assessee had filed several applications in form No. 6 and no rejection order on them was communicated to the assessee. For that, he relied on Lachman Chaturbhuj Java v. R.G.Nitsure [1981] 132 ITR 631 (Bom.). He also opined that even assuming that the return filed by the assessee originally on 31-12-1981 was not a return Under Section 139(1) ; it cannot be denied, it was return Under Section 139(4). The Act nowhere lays down that the return Under Section 139(4) can be submitted only once. In his view, even though, a revised return Under Section 139(5) can be filed only in respect of a return already submitted Under Section 139(1) or 139(2) nothing prohibits an assessee from, filing more than one return Under Section 139(4) for the same asst. year before the assessment is completed. The decision of Hon'ble Calcutta High Court in the case of Mst. Zulekha Begum (Khatoon) v. CIT [1981] 129 ITR 560 was relied on.

18. Turning to the next point, that is, whether machinery used for the manufacture of cold drinks like Thumps Up, Limca, Gold Spot etc. is not entitled to the investment allowance as it falls within item (5) of Eleventh Schedule. He indicates that the claim of the assessee that is used synthetic flavouring essence and not any kind of blended flavouring concentrate is not disputed by the assessing officer or at least no material has been brought on record to dislodge the claim in this regard. Enunciating the arguments of the learned counsel of the assessee in this

respect, the learned CIT(A) observed that in several cases High Courts have made distinction between blended flavouring concentrate and synthetic flavouring essence and they are : (1) Duke & Sons (P.) Ltd. v. G.T. Kundani, Supdt. of Central Excise [Petition No. 944 of 1973] ; 19. The learned CIT(A) indicated that the Hon'ble Bombay High Court in Duke & Sons (P.) Ltd.'s case (supra), expressed their opinion as under :- In my view all the said passages from the standard books clearly support the opinion expressed by the petitioners' experts in their affidavits that in all their aspects 'Concentrates' are distinct the petitioners in the manufacture of aerated waters. As discussed above, in this case not only by their trade or commercial meaning 'concentrates' and 'essence' are distinct and not synonymous with each other but the said distinction in the meaning is also to be found both in its technological sense and in their dictionary meaning. Since it is admitted in this case that the petitioners are using only synthetic essences in the manufacture of beverages or aerated waters and since in my view the essences cannot be included in the term 'blended flavouring concentrates' the said aerated waters manufactured by the petitioners would fall within the exemption provided by the notification and would be entitled for excise duty only at 10 per cent ad valorem.

Describing the facts of Duke & Sons (P.) Ltd.'s case (supra), the learned CIT(A) pointed out that for aerated water manufacturing, following ingredients are used : The Hon'ble Bombay High Court explained the learned CIT(A), had come to the conclusion, on the above facts, the assessee was not using any blended flavouring concentrate. The learned CIT(A) opined, the assessee in the present case is also manufacturer of aerated water and not using blended flavouring concentrate in any form. Therefore, embargo to item (5) of Eleventh Schedule is not applicable in this case.

20. It was submitted on behalf of the assessee before the CIT(A) that the Assessing Officer had also raised, in course of hearing before him, an objection that the assessee had not created necessary reserve in connection with that allowance of investment allowance. However, in the asst. order, no such discussion was recorded. At any rate, the learned CIT(A) observed, the assessee had loss of R&, 1,61,716 for the year under consideration, obviously, therefore, the

assessee could not create the necessary reserve as required under law. The CIT(A) pointed out that provisions of Section 32A(4) entitles the assessee to create necessary reserve in the year in which it earns adequate profits to make reserve and this position has also been clarified by the CBDT in its Circular No, 305 dt. 12-6-1981 and such circular is binding on all assessing officers. The learned CIT(A), however, directed the assessing officer to verify the details of plant and machinery on which the assessee had claimed investment allowance and determined the quantum of investment allowance, that may be carried forward in the subsequent asst. year, according to law.

21. The learned D.B. at the outset objected to the acceptance the revised return, on the basis of which, claim of investment allowance was made. In his opinion, revised return can only be filed to rectify inadvertent mistake and not deliberate omission. The assessee did not create any reserve and, therefore, did claim investment allowance in its original return. It cannot be construed as mistake inadvertently committed, on the other hand, it was intentionally not claimed in the original return for want of creation of reserve. In respect of orders on form No. 6 filed by the assessee on different occasions, he argued, assessing officer was justified in viewing mere filing of form No. 6 does not tantamount to grant extension. In his opinion, when no order has been passed, it cannot be said, the time was extended. Extension of time requires a positive act and it is not a penalty case that penalty has been imposed without refusal on the form of extension which was the subject matter of the decision relied by the CIT(A), Lachman Chaturbhuj Java's case (supra). Coming to the validity of the return subsequently filed, captioned as revised return, as return filed Under Section 139(4), the learned D.R. submitted that the stand taken by the CIT(A) is confusing, so far as he did not decide whether the return was filed Under Section 139(5) or 139(4). He argued, in a speculative decision on the part of the CIT(A) renders his order unlawful. Countering the opinion of the CIT(A) that aerated water are not using blended flavouring concentrate in any form, he argued that if this interpretation is accepted then item No. (5) of the Eleventh Schedule will become otiose and inoperative and such an interpretation is uncalled for. As to the direction of the learned CIT(A) to compute investment allowance on the basis of plant and machinery owned, the learned D.B. opined that such direction is prematured for want of creation of

reserve by the assessee.

22. We have considered the rival submissions, facts and materials on record. After cogitation, we came to the conclusion that the return filed subsequently claiming investment allowance is only academic. It is not in dispute that the assessee-respondent had claimed investment allowance at the time of assessment. It will be cavilling' to reject the claim of investment allowance only because it was claimed in the revised return in a case it was not treated as valid revised return. We shall, therefore, proceed on the basis that the asseasee had made claim of investment allowance before the Assessing Officer during the course of assessment proceedings. The assessing officer did not comment about the relative and prescribed particulars for the claim of investment allowance filed by the assessee or not. In the grounds of appeal, no suggestion has been made to contrary. We shall presume, necessary and prescribed particulars are in the record.

23. Now to enunciate whether the assessee's products are hit by embargo on item No. 5 of Eleventh Schedule, we must quote the relevant item itself as stated in the said schedule- Aerated waters in the manufacture of which blended flavouring concentrates in any form are used" (An explanation was appended to this item which is as under :- Blended flavouring concentrates shall include and shall deemed always to have included, synthetic essences in any form") (by Finance Act, 1987 w.e.f. 1-4-1988).

We shall now discern the decision of CIT(A) in the facet of aforesaid "explanation". No doubt, their Lordships of Bombay High Court had distinguished synthetic essence from blending flavouring concentrates in excise duty case but the "explanation" in Income-tax Act clearly describes that blended flavouring concentrates include synthetic essence. Therefore, it crumples the acropolis of the CIT(A)'s finding, i.e. as the assessee is using synthetic essence in any form, no investment allowance is allowable to it. [See submission of assessee's counsel before the CIT(A) in CIT(A)'s order at page 9]. Hence, investment allowance is not allowable to it.

24. We must point out that though the Explanation was inserted by the Finance Act, 1967, w.e.f. 1-4-1988 as it is clarificatory in nature, it will have retrospective

effect. In the case of CIT v. Sriram Agrawal [1986J 161 ITR 302/28 Taxman 81, the Hon'ble Patna High Court has held that even if explanation was not in existence when the Tribunal of the assessee was disposed of, High Court can take cognizance of explanation. Therefore, even if when the assessment or appeal was decided in a position to take cognizance of the said explanation. We shall record our decision in respect of non-creation of reserve of the assessee necessary for investment allowance and its effect for computation. It is not disputed that during the year the essessee showed a loss of Rs. 1,61,716, naturally, therefore, no reserve could be created under the law. The CIT(A) rightly pointed out that by virtue of provisions of Section 32A(4) it is not open to the assessee in such circumstances to create necessary reserve in the year in which it earns adequate profit to cover such reserve and this position has also been clarified by the CBDT in its Circular No. 305 dated 12-6-1981. This opinion of the CIT(A) is unassailable. Therefore, if all other conditions are satisfied, the assessee is entitled for carry forward of investment allowance in subsequent years and get the benefit of such allowance when the profit is earned and necessary reserve is created.

25 to 27. [These paras are not reproduced here as they involve minor issues].

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