

**inspecting Assistant Vs. Har Parshad and Co. Ltd.**

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**Court :** Income Tax Appellate Tribunal ITAT Delhi

**Decided On :** Dec-27-1990

**Reported in :** (1991)37ITD241(Delhi)

**Judge :** V Elhence, J Kathuria

**Appellant :** inspecting Assistant

**Respondent :** Har Parshad and Co. Ltd.

**Judgement :**

1. This appeal, filed by the department, and the cross-objection thereto, by the assessee, arise out of the order dated 31-3-1987 of the learned Commissioner of Income-tax (Appeals)-VIII, New Delhi, for the assessment year 1981-82.

2. The assessee M/s. Har Parshad & Co. Ltd., E-1 & 2 Mahajan House, NDSE-II, New Delhi is a company. It derives income from the export of rail accessories like fish plates, fish bolts and metal rail clips etc., to Iran. During the assessment year in question the assessee received cash assistance of Rs. 38,23,642 out of which it paid Rs. 30,83,920 to the following parties in terms of the contracts with them :- The full details of the cash assistance received during the year ending 30-6-1980 appear at pages 88 & 89 of the department's Paper Book and pages 24 & 25 of the assessee's Paper Book. The balance amount of Rs. 7,39,722 (Rs. 38,23,642 - Rs. 30,83,920) was tendered by the assessee as its income. According to the assessee, the amount of Rs. 30,83,920 did not represent its income. The assessee had entered into an agreement with Iranian State Railways in the

assessment year 1979-80 for the supply of rail track accessories. The parties above named were manufacturers who supplied these accessories to the assessee, who, in turn exported it to the Iranian State Railways. The cash assistance was received by the assessee from the Government of India in the Ministry of Commerce, from year to year, in terms of the scheme of cash assistance to exporters. Though the system of accounting followed by the assessee is mercantile, the cash assistance had been offered for taxation on cash (receipt) basis. In the original assessment the Income-tax Officer disallowed the amount of Rs. 30,83,922 vide assessment order dated 19-9-1984 after obtaining the directions dated 14-9-1984 of the Inspecting Assistant Commissioner under Section 144B. The Income-tax Officer had examined Sarv shri D. Bidani and Vipin Khanna employees of the assessee company. The grounds of disallowance of the amount of Rs. 30,83,922 were the following : - (i) Business expediency in terms of Section 37(1) was not established.

(ii) The amount of cash assistance paid to the manufacturers was only Rs. 13,52,773 during this year i.e., (iii) The assessee could not, by virtue of agreements, stultify the policy of the Government unless such payments were in the nature of application of income. Such sharing of export incentive by non-exporters is against public policy, which cannot be allowed as a permissible deduction. The right to receive the incentive was not transferable.

Similarly the assessee had received an amount of Rs. 7,72,000 as export incentive and duty drawback out of which it declared only an amount of Rs. 1,13,000 as income on cash (receipt) basis, the balance amount of Rs. 6,58,883 having been parted with to the suppliers (manufacturers) similarly on a similar basis the Income-tax Officer taxed the entire amount of Rs. 7,72,000 in the hands of the assessee.

3. The assessee went up in appeal before the Commissioner of Income-tax (Appeals). The CIT(Appeals), vide his order dated 11-1-1985, after obtaining the comments of the Income-tax Officer, observed that the IAC had directed the ITO to allow the claim of the assessee after verification of the fact that there was no bar in transferring the right to receive the incentives and that in doing so no violation of

public policy was involved. According to the learned CIT (Appeals), the directions given by the IAC had not been carried out by the ITO and that the ITO's comment that no further verification could be made, was not correct. However, without prejudice to the said observation, the learned CIT (Appeals) directed the Income-tax Officer to examine the matter in the light of the directions already given by the IAC after examining para 165 of Import and Export Policy for 1984-85 and all other relevant particulars having a bearing on this point. (There was an identical para in the Export and Import Policy for 1978-79 and 1979-80). It was to the following effect: - Para 165: - In respect of "third party" exports, i.e., where all or any of the export documents contain the names of two parties, the import replenishment licence as admissible under the import policy for Registered Exporters may be claimed by any of these two parties provided (i) the claimant is a Registered Exporter and is otherwise eligible under the policy, (ii) the claimant produces a certificate of "disclaimer" from the other party in his favour, and (iii) the party granting the disclaimer, is not itself debarred from receiving licences etc., under the Imports (Control) Order, 1955.

4. Thereafter the Income-tax Officer took up the matter with the Engineering Export Promotion Council and the Joint Chief Controller of Imports and Exports. The Joint Controller of Imports and Exports informed (vide letter dated 8-11-1985 - copy at pages 9 & 10 of the Department's Paper Book" that information could not be furnished in the absence of file numbers. The Income-tax Officer observed that para 165 of the Import and Export Policy only related to Import Entitlement Licences and did not make any reference to cash assistance and other export incentives. He observed that the Engineering Export Promotion Council could not furnish any document or any order of the Government whereunder the cash assistance could be claimed in a manner similar to the one contained in para 165 aforesaid. The Income-tax Officer therefore, again added the full amounts of Rs. 38,23,642 and Rs. 7,72,000 as the assessee's income. This order was passed by him on 29-1-1986.

5. The assessee again came up in appeal before the learned CIT(Appeals). On a consideration of the material the learned CIT(Appeals) vide his impugned order dated 31-3-1987 held that the duty drawback and export cash incentives were

transferable and that such a transfer is in conformity with public policy. He also held that being the position, the ITO was bound to exclude the amount of export incentive and duty drawback passed on by the assessee company to the suppliers without raising further issues like accrual of income or diversion of income.

6. Before us in further appeal Shri Amitabh Kumar the learned Departmental Representative strongly relied upon the two orders of the Income-tax Officer as also on the following decisions relating to the point as to when a particular sum can be said to amount to the application of income : - On the other hand Shri H.P. Agrawal, the learned counsel for the assessee reiterated the submissions made on behalf of the assessee before the income-tax authorities and relied on the orders dated 11-1-1985 and 31-3-1987 of the learned CIT(Appeals). He also referred to the decision of Jabalpur Bench of the Tribunal in ITO v. Indo Gulf [1986] 16 ITD 175 wherein the pattern of facts was stated to be similar.

7. We have carefully considered the rival submissions as also the decisions referred to above. We have also gone through the various orders of the income-tax authorities and the papers forming part of the exhaustive paper books filed by the department and the assessee. The first point to be noticed is that the order dated 11-1-1985 of the learned CIT(Appeals) was accepted by both the parties and therefore, the department can no longer set up any plea or case which goes contrary to the tenor of that order. The agreements entered into by the assessee with the suppliers/manufacturers were similar. We may therefore refer to the relevant provisions in any one of those agreements, say that with M/s. Everest Steel. Fabricators Ballabhgarh.

Under Clause 2, it was the obligation of the Manufacturer and Supplier to indemnify the assessee against all claims arising from the defects, delay or supply of goods. Further, Clause 11 provided that all export entitlements which accrue or arise on account of the export of the goods (including cash assistance) shall accrue to the manufacturer & supplier on the F.O.B. prices as given in Annexure I and the exporter (assessee) shall have to right, title and interest in the same whatsoever. Any replenishment licence or duty drawback was also to similarly accrue only to the manufacturer and shipper to the exclusion of the assessee. The

assessee as the exporter was to issue a disclaimer for the same in favour of the Manufacturer and Shipper and to render all reasonable and lawful assistance as may be deemed necessary by the Manufacturer and Shipper to claim the export incentive or as may be prescribed under the rules. The assessee had written a letter dated 12-12-1984 to the Engineering Export Promotion Council to issue a certificate (with reference to Para 165 of the Import Policy) to the effect that the cash Assistance could also be claimed by the third party on production of a disclaimer by him and provided his name appeared in any of the documents in the light of the said para. The Engineering Export Promotion Council confirmed the same that the provision contained under Para 165 for claiming Import Replenishment Licence in respect of 3rd party exports also held good for claiming cash compensatory support admissible under the scheme of registered exporters. (Copies at Pages 83 and 84 of the assessee's paper book).

The assessee had also written to the Federation of Indian Export Organisations (set up by the Ministry of Commerce, Government of India) and the clarification given by it to the assessee vide its letter dated 21-1-1986 was that Export Houses/Exporters could claim incentives from the Government of India and pass on the same to the concerned manufacturer and that the manufacturers could also directly claim the export incentives based on the disclaimer/"No objection" certificates provided by the concerned Export Houses/ Exporters. It also confirmed that this arrangement could be built into the contractual arrangements between the Export Houses/Exporters and the Manufacturers (Copy at page 82 of the assessee's paper book). Since the export incentives in question were also canalised through the Ministry of Commerce (Government of India) and it is on their authority that the above mentioned clarifications had been issued by the Export Promotion Council and the Federation of Indian Export Organisations, the question of the agreements entered into by the assessee (exporter) with the Manufacturers & Shippers being against public policy could not arise.

The basis of cash assistance was the executive Scheme of Cash Assistance formulated by way of Import and Export Policy under Section 3 of the Import and Export (Control) Act, 1947. We have also not been shown that such an objection could be taken by the Income-tax Officer even in respect of duty drawback (which

has a statutory basis i.e., under Section 75 of the Customs Act, 1962 and Section 37 of the Central Excises & Salt Act, 1944. The Engineering Export Promotion Council had also written to the Income-tax Officer on 1-11-1985 and 11-11-1985 that Rep. Circular No. 13/67 dated 16-5-1967 governed the admissibility of cash assistance on third party exports. (Copies at Pages 7, 8 and 11 of the department's paper book). The erstwhile Ministry of Foreign Trade had also informed all concerned, vide its letter dated 18-8-1971, regarding the provisions for cash assistance (copy at pages 13 - 19 of the department's paper book). The assessee company had received cash assistance from the JCCI & E itself as an exporter (except in respect of one sale dated 3-11-1978 vide invoice No. 1032) and therefore it was not necessary to procure any disclaimer from the Manufacturer/Supplier.

The Invoice No. 1032 related to M/s. Steel Fast who remitted Rs. 1948/27 as cash assistance to the assessee after keeping the amounts of cash assistance attributable to it under its agreement (vide pages 26 - 27 of the assessee's Paper Book). The assessee company's case was never of third party exports. This was also clarified by it in its letter dated 26-12-1985 to the Income-tax Officer (copy at pages 86 - 87 of the department's paper book). In regard to the dutydraw back, the shipping bills carried the note that duty drawback may be passed on to the supplier. The drawback payment order also showed that it could be endorsed by the claimant in favour of any party. (Vide copies at pages 51, 55 - 57 of the assessee's paper book). The CBDT had also clarified vide its Circular No. 466 dated 14-8-1986 - [1986] 161 ITR 68 (Statutes) that if any export house/trading house holding a certificate from the Ministry of Commerce passed on to the manufacturer a part or whole of the tax benefit under Section 80HHC, it may be treated as an allowable business expenditure in the hands of the exporter. This Circular is with reference to Section 80HHC. though it had been relied upon on behalf of the assessee to buttress its original argument before the Income-tax Officer that to the extent it had parted with cash assistance to the manufacturers/suppliers it may be treated as expenditure allowable to the assessee under Section 37(1). In fact in the case of Indo-Gulf (supra), decided by Jabalpur Bench, the facts were similar. There the business of the assessee was to act as an export house for the export of garments. It used to book orders from

buyers and then to get them fabricated from the manufacturers. It had entered into agreement with a manufacturer in pursuance to which it parted with 80% of the cash incentives to it. It was held, after referring to the decision of the Supreme Court in the case of Sitaldas Tirath Das (supra), that the agreement had created a charge by which income by way of cash incentive stood diverted at the source to the extent of 80%. The same position results in the present case in terms of Clause 12 of the agreements referred to above. The fact that the assessee received the cash incentives etc., itself and then parted with a whole or a part to the manufacturers/suppliers later on, would not make any difference as to the character of those receipts attributable to the manufacturers/ suppliers. As explained by the assessee, this was done in order to improve upon its own liquidity. The decision of the Supreme Court in the case of Vibhuti Glass Works (supra) or of the Gujarat High Court in the case of Yuvrani Premkumari (supra) are distinguishable on facts and would not help the department. Having regard to the controversy with which the learned CIT(Appeals) was seized in this case we are of the view that he was justified in holding that cash incentives and duty drawback were transferable and that such transfers could not be said to be either against public policy or against para 165 of the Import and Export Policy and so the, amounts transferred were excluded from the assessee's income.

8. In the cross objection filed by the assessee the point taken is that the learned CIT(Appeals) erred in law in not entertaining the legal ground that the cash assistance amount of Rs. 7,39,723 was not taxable in law. The learned CIT(Appeals) had held that, such a ground did not arise from his predecessor's order dated 11-1-1985 and was therefore not entertainable and that even on merits the amount in question was taxable as a trading receipt.

9. We have heard the learned representatives of both the sides on the cross objection. The assessee had itself tendered the amount in question as its income. Such an offer or admission has neither been explained to be the result of any inadvertence or mistake nor can such a plea be helpful now in view of the retrospective amendment of Section 2(24)(vb) and Section 28(iiib) with effect from 1-4-1967 by the Finance Act, 1990, as the amount is, treatable, as income/"profits and gains of business or profession". The cross objection was therefore, rightly

and fairly conceded by the learned counsel for the assessee as devoid of any merit. It must therefore fail.

10. In the result, the appeal filed by the department as well as the cross objection preferred by the assessee, both fail and are dismissed.

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